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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RALPH L. HARVEY,
Petitioner,

v.

HOLT OIL & GAS CORPORATION and
FAYWIN INVESTMENTS PTY. LTD.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM PANNILL
1600 Two Houston Center
909 Fannin
Houston, Texas 77010-1007
(713) 659-8090
Counsel for Petitioner

Of Counsel:
ANITA C. JACOBE
ELIZABETH N. JONES

February 17, 1987

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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QUESTION PRESENTED

Whether due process permitted a court in Texas to assert in personam jurisdiction over a resident of Oklahoma in a contract action despite a clause in the contract that selected Oklahoma as the forum for disputes.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ralph L. Harvey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 801 F.2d 773 and has been reprinted in the appendix.

The United States District Court for the Northern District of Texas entered a memorandum order on July 29, 1983, that was not reported but has been reprinted in the appendix.

JURISDICTION

This is a diversity case in which the federal court in Texas took jurisdiction of a dispute arising out of a transaction in Oklahoma. The plaintiff was a Texas corporation and the defendant an individual living in Oklahoma City. The court of appeals affirmed a judgment against the defendant on October 8, 1986. The court of appeals denied rehearing on November 19, 1986, and this petition for certiorari is filed within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

A. United States Constitution, Fourteenth Amendment

Section 1. Due process of law

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition restricts itself solely to the question whether a federal court sitting as a court of Texas properly

asserted in personam jurisdiction over a citizen of Oklahoma in a dispute arising out of oil exploration in Oklahoma that took place under a contract that selected Oklahoma procedure to "determine" remedies for breach.

In 1983, the plaintiff Holt Oil & Gas Corporation sued the defendant, Harvey, in federal court in Dallas for breach of contract. When the contract was formed in 1981, Harvey had rejected an agreement offered by the plaintiff that selected Dallas as the forum for suits. The contract agreed on substituted Oklahoma as the forum. Fifteen months later, after signing the Oklahoma contract and threatening suit in Oklahoma, the plaintiff sued Harvey in Dallas.

The trial court had the contract documents before it, but held the contractual provisions "not relevant" because Harvey owned an apartment in Houston. The court of appeals did not discuss the Oklahoma contract because of its view that Harvey's contacts with Texas were too limited to support specific jurisdiction. But the court of appeals found general jurisdiction because Harvey had once attended college in Texas, had travelled and educated his children there, and had carried on other business there. 801 F.2d at 778-80.

The controversy arises from the following facts:

a. Holt's well in Oklahoma.

In 1981, the plaintiff Holt Oil & Gas Corporation (a Texas corporation) persuaded the defendant, Ralph L. Harvey, to join a well Holt was in the process of drilling in Beaver County, Oklahoma (Tr. 51). Holt approached Harvey because Harvey owned a one-eighth interest in the property (App. 49a).

Beaver County, in the Oklahoma Panhandle, was Harvey's main place of business as an oil-and-gas producer (Tr. 23). As an individual, Harvey had been responsible for drilling more than a hundred wells in Beaver County.

b. Agreement proposed by Holt.

Holt proposed an agreement to Harvey by a letter to him in Oklahoma City. Holt dated its agreement November 18, 1981 (App. 33a).

The letter agreement provided that the parties could sue each other in Dallas County, Texas. To the letter agreement, Holt attached an invoice for $30,850 and an operating agreement prepared on Form 610 of the American Association of Petroleum Geologists, which is a printed form in wide use among producers of oil and gas.

c. Harvey's counter-offer.

Harvey rejected Holt's agreement (App. 39a). His letter stated:

> I am hereby rejecting the letter agreement and invoice submitted. . . . I am willing to sign the Operating Agreement submitted subject to the following changes. . . .

(App. 39a). The next day, Holt "agreed to and accepted" Harvey's letter with its changes (App. 42a).

Article XIV of the printed operating agreement provides that Oklahoma law will "determine" "all matters pertaining" to the agreement. It reads:

> The essential validity of this agreement and all matters pertaining thereto, including, but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located.

(App. 38a). The first page of the operating agreement defined the contract area as "CAMPBELL PROSPECT", "BEAVER COUNTY", "STATE OF OKLAHOMA" (App. 37a).

d. Dispute over drilling expenses of Holt's well.

The well was drilled but failed. Holt and Harvey then disagreed about whether Harvey should pay a part of Holt's drilling expenses that amounted to $100,000. Holt hired an Oklahoma City law firm and threatened suit (Pl. Exh. 44). On November 8, 1982, Holt threatened Harvey with suit in "Oklahoma courts" (Def. Exh. 10).

On February 14, 1983, Holt sued Harvey in federal court in Dallas.

e. Harvey's motion to dismiss.

Harvey moved to dismiss on the grounds that the Texas courts lacked in personam jurisdiction (R. 36-51). Harvey attached an affidavit in which he stated that he had no agent in Texas, had no registered office in Texas, had never authorized an agent to accept service in Texas, had not maintained an office or residence in Texas, had no bank account in Texas, owned no real property or personal property in Texas, and conducted no business

in Texas as an individual (R. 50-51). The plaintiff took Harvey's deposition and established that:

1. Harvey had attended college in Texas from 1952 to 1955 (App. 44a).

2. Harvey had worked in Texas for six weeks in 1959 and three months in 1960 (App. 45a-46a).

3. Harvey's wife was born in Spur, Texas (App. 47a).

4. Harvey's son and daughter were pursuing higher education in Texas (App. 2a).

5. Harvey had purchased a condominium apartment in Texas for his son to live in while doing research at the Texas Medical Center (Tr. 24).

6. Harvey owned stock in a Texas corporation, had served as a director, and had attended directors' meetings in Dallas (Tr. 24-25).

7. Harvey's own corporation, Marlin, had drilled five wells in Texas, had a license to do business in Texas, and had answered one lawsuit in Texas that was later dismissed (Tr. 22; App. 48a, 49a, 50a). Harvey had visited one of Marlin's well sites (App. 49a).

8. Each year, Harvey attended the football game in Dallas between the University of Texas and the University of Oklahoma (App. 45a).

9. Each year, Harvey played in a golf tournament in Corsicana with his best friend from college (Tr. 26).

Harvey amended his affidavit to include the condominium ownership, which he said he had forgotten (R. 61).

f. Judgment of the trial court.

The district court then denied Harvey's motion to dismiss (R. 122-28). The court held, "Applying these principles of due process to the case at hand, the court finds that by purchasing a condominium in Houston and financing through a Texas bank, if by no other act, defendant has availed himself of the protection of Texas laws" (App. 3a).

Harvey answered and counterclaimed against Holt for breach of the operating agreement and negligence in drilling (R. 235-42). Pending trial, Holt filed for bankruptcy protection under Chapter 11, and the plaintiff's cause of action was assigned to a shareholder, Faywin Investments Pty. Ltd. (Dickson Dep. at 16, 126).

At length, a Dallas jury returned a verdict in favor of Holt and Faywin for $207,208.64 (App. 7a).

g. Decision of the court of appeals.

Stating that the issue of jurisdiction was "close," the court of appeals affirmed the judgment against Harvey on October 8, 1986. The opinion said:

> None of Harvey's various contacts with Texas, alone, would support an exercise of general jurisdiction. For example, Harvey's frequent journeys into Texas for personal and recreational purposes would not by themselves constitute the level of contacts which must exist for general jurisdiction to lie. *See generally Laxalt v. McClatchy,* 622 F. Supp. 737, 745 (D. Nev. 1985); *cf. Helicopteros Nacionales,* 110 S. Ct. at 1874 (purchasing trips into the forum insufficient to support assertion of general jurisdiction). Similarly, Harvey's ownership of realty in the

> forum unrelated to this litigation would not alone support an exercise of general jurisdiction. *See Shaffer v. Heitner,* 433 U.S. 186 (1977). Nor would Harvey's status as an investor and former director of a Texas corporation alone be sufficient. *See id.* at 210.
>
> Determining the existence of personal jurisdiction does not, however, involve an examination of each of Harvey's contacts with Texas viewed in isolation from one another. Rather we are required to examine Harvey's contacts *in toto* to determine whether they constitute the kind of continuous and systematic contacts required to satisfy due process.

801 F.2d at 779. The court of appeals discussed the forum clause in one sentence in its analysis of the absence of specific jurisdiction. It said:

> Although the contractual relationship between Holt and Harvey may have been cemented in Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement.

801 F.2d at 778. Harvey has sought certiorari to review this decision.

REASONS FOR GRANTING THE WRIT

DUE PROCESS PROHIBITS THE EXERCISE OF IN PERSONAM JURISDICTION BY THE COURTS OF A STATE WHEN THE PARTIES TO A CONTRACT HAVE STRUCTURED THEIR AGREEMENT TO SELECT ANOTHER STATE AS THE FORUM.

A. *The defendant did not have fair warning that he was subject to suit in Texas by this plaintiff because their agreement selected Oklahoma as the forum for litigation.*

1. The federal courts enforce contracts that select a forum.

The lower courts mistakenly held that they could exercise in personam jurisdiction over this defendant because their lack of specific jurisdiction over his Oklahoma contract was offset by their general jurisdiction over his person. If this Court allows that result to stand, then this case will nullify the holding in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, that the parties to a contract may select a forum for their litigation without regard to which sovereign's courts may exercise in personam jurisdiction over them.

This defendant made it a condition of his business agreement that the plaintiff sue him in Oklahoma, which contained the contract area. The plaintiff actually signed a contract that selected not only Oklahoma's substantive law but also Oklahoma's procedure and remedies. Under this Court's decision in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, the language of that agreement selected Oklahoma as the forum for disputes arising out of the contract. When the plaintiff sued in Texas,

that violated not only the contract but the Constitution. The defendant did not have fair warning under this course of dealing that he was subject to suit in Texas as the Constitution requires.

This case presents the other side of the situation in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). This defendant received clear notice that he was subject to suit only in Oklahoma.

These parties purposefully rejected the laws and the courts of Texas. The *Burger King* defendant purposefully accepted Florida's laws. Unlike the *Burger King* plaintiff, this plaintiff stipulated that "all matters . . . including . . . matters of performance, non-performance, breach, remedies, procedures, rights, duties, and interpretation shall be governed and determined by the law of" Oklahoma (App. 38a).

Yet the lower courts ignored both the dealings between the parties and the language of their contract. Instead, they counted contacts. The lower courts erred because they ignored this Court's repeated holdings that an individual may structure his dealings so as to avoid suit in another jurisdiction.

The decision below makes it impossible for the parties to an interstate contract to shape their agreements to avoid litigation in other states. Such a holding has grave consequences for the business of the nation. The entire trend of this Court's decisions about personal jurisdiction has been to examine actual business dealings to decide whether the defendant "purposefully" established minimum contacts with the forum. There can be no more purposeful action than rejecting a foreign forum in favor of the defendant's home state.

2. The parties agreed to select Oklahoma as the forum for contract disputes.

The parties agreed to select Oklahoma as the forum for suits in Article XIV of their printed agreement. They stipulated that "all matters" including "procedures" will be "determined" by the law of Oklahoma. This is a forum-selection clause.

Oklahoma "procedures" can only "determine" a breach if Oklahoma courts provide the forum. Neither a Texas court nor a federal court will apply Oklahoma "procedures." In fact, the plaintiff tacitly admitted that this was the meaning of its agreement when it retained an Oklahoma lawyer and threatened suit in the Oklahoma courts.

This Court found a "forum-selection clause" in the *Szukhent* contract that provided for the rights of the parties to be "determined, in accordance with the laws of the State of New York." The defendant had signed a printed lease of farm equipment. The contract designated an agent in Long Island City, New York, although the defendant lived in Michigan. This Court said:

> The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. The contract specifically provided that "This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York." And it is

> settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . .

375 U.S. at 315-16. The language of the Harvey contract is identical in substance. Both contracts even use the word "determined."

The Court later quoted this language in reversing a decision of the Fifth Circuit Court of Appeals that gave "far too little weight and effect . . . to the forum clause in resolving this controversy." *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 8. This case arose from a contract that selected the London Court of Justice as the forum for disputes. There, the Court said, "There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." 407 U.S. at 14.

3. The courts below ignored the forum clause in this contract because they asserted general jurisdiction.

The lower courts gave no weight to this forum clause at all. The district court misread the clause as a choice-of-law clause and dismissed it as irrelevant:

> Defendant emphasizes that the choice-of-laws provision in the contract between the parties specifies that any disputes over the agreement would be governed by the law of the state in which the contract area was located, i.e., Oklahoma. This is not a factor in determining whether the requisite "minimum contacts" exist.

(App. 4a). Of course, that was flatly wrong, as the *Burger King* decision made clear. The trial judge concluded that Harvey's business dealings would suffice for jurisdiction in Dallas because he had purchased a condominium in Texas for his son. That was also wrong under *Helicopteros Nacionales v. Hall,* 466 U.S. 408, and *Shaffer v. Heitner,* 433 U.S. 186.

The Court of Appeals ignored the forum clause to create a pastiche of minimum contacts drawn from Harvey's personal life. That, too, was wrong in light of the *Burger King* decision and the decisions of this Court that enforce forum clauses.

Harvey purposefully rejected a Texas forum and selected an Oklahoma forum. He had every right to expect not to be haled into court in Texas. The federal courts held him in Texas anyway. That denied Harvey due process of law.

B. *The decision of the Court of Appeals conflicts with other decisions holding that the law chosen by the parties in their contract can determine personal jurisdiction.*

The Eleventh Circuit Court of Appeals only last year enforced the choice of English jurisdiction in a contract that contained a choice-of-law clause. The decision of the Fifth Circuit Court of Appeals in this case directly conflicts with that decision. *Sea Lift, Inc. v. Refinadora Costarricense,* 792 F.2d 989 (1986). This decision and another one in the Fifth Circuit itself have read *Burger King v. Rudzewicz* to give controlling weight to choice-of-law clauses on the question of in personam jurisdiction in contract cases.

The *Sea Lift* court held that the choice of English law in a salvage contract amounted to evidence that the defendant had not purposefully established minimum contacts with Florida, the state of the plaintiff's residence.

The parties had signed a Lloyd's of London form of salvage contract. The Lloyd's standard form is printed and the most widely used salvage contract in the world. 792 F.2d at 992. Likewise, the Form 610 operating agreement signed by Harvey and Holt is in wide use as as a form of oil-and-gas operating agreement in the United States.

The *Sea Lift* court relied heavily on a decision of the Fifth Circuit that also conflicts with the instant holding. In that case, *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (1983), officers of an Alaska corporation closed a deal in Texas but the agreement "expressly provided that it was to be governed and construed according to Alaska law." 700 F.2d at 1027. Like Harvey, the Alaska corporation refused to pay the contract price. It insisted that the contract goods were not suitable. *Id.* The Texas plaintiff sued in Federal District Court in Fort Worth, and the Fifth Circuit Court of Appeals affirmed the trial judge's decision to dismiss. As a later Fifth Circuit panel wrote:

> In *Hydrokinetics,* we emphasized no less than eight times that the parties had agreed that their contract was to be governed and construed according to Alaska law rather than the law of the forum state, Texas.

D. J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 548 (1985).

In neither of these cases did the plaintiff go so far as to select a forum by agreeing for disputes to be "determined" under the laws of England or Alaska. That is the language of a forum clause. These choice of law clauses merely provide that the law of another state will "govern", which allows any forum to apply the law chosen. Cf. Unif. Comm. Code § 1.105. Otherwise, the only apparent difference between the *Hydrokinetics* case and the *Harvey* case lies in the distance between Alaska and Oklahoma. Due process is not found on a map. The Court should grant certiorari to resolve this conflict among the circuits and within the Fifth Circuit.

C. *The Court of Appeals misapplied the doctrine of general jurisdiction by confusing Harvey's personal activities with his general business.*

The Court of Appeals admitted that Texas lacked specific jurisdiction over Harvey but held that Texas did have general jurisdiction based on systematic and continuous contacts (App. 20a). The Court further admitted that none of the five "general contacts" it listed would support a finding of general jurisdiction "standing alone" (App. 19a). Conceding that "the issue is close," the court held that all five categories of contacts taken "in toto" support a finding of general jurisdiction (App. 18a, 20a).

The question is whether the lower courts can amalgamate a lifetime of separate events—business, family, and personal—to hold that Harvey was doing business in Texas. If we are to respond in the courts where our children attend college and where we play golf, then there are no limits to in personam jurisdiction. The touchstone of doing business must remain purposeful activity if jurisdiction over the person retains any limits.

CONCLUSION

The Court should grant certiorari, reverse the judgment below, and dismiss this action.

Respectfully submitted,

WILLIAM PANNILL
1600 Two Houston Center
909 Fannin
Houston, Texas 77010-1007
(713) 659-8090

Counsel for the Petitioner
Ralph L. Harvey

Of Counsel:

ANITA C. JACOBE
ELIZABETH N. JONES
1600 Two Houston Center
909 Fannin
Houston, Texas 77010-1007
(713) 659-8090

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 1987, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to C. Steven Matlock, Esq., Jackson, Walker, Winstead, Cantwell & Miller, 6000 InterFirst Plaza, 901 Main Street, Dallas, Texas 75202, counsel for the respondent. I further certify that all parties required to be served have been served.

WILLIAM PANNILL
1600 Two Houston Center
909 Fannin
Houston, Texas 77010-1007
(713) 659-8090

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-83-0277-G

HOLT OIL & GAS CORPORATION,
Plaintiff,

v.

RALPH L. HARVEY,
Defendant.

(Filed July 29, 1983)

MEMORANDUM ORDER

This case arises out of defendant's alleged breach of an agreement to pay pro rata expenses of drilling an oil well located in Oklahoma. Plaintiff is a Texas corporation and defendant is an individual who resides in Oklahoma.

Before the court are defendant's motion to dismiss, plaintiff's response thereto, defendant's reply, defendant's motion for a protective order, plaintiff's motion for sanctions, and defendant's brief in opposition, as well as various other supporting briefs.

Defendant's Motion to Dismiss

Defendant requests the court to dismiss the complaint for lack of in personam jurisdiction. Attached to the mo-

tion to dismiss is defendant's affidavit stating that he, Ralph Harvey, owns no real or personal property in Texas, maintains no office, residence or bank account in the state, and has no agent or registered office here.

Following the taking of his deposition in Oklahoma City, however, defendant filed an amended affidavit stating that he owns a condominium located in Houston, Texas. According to plaintiff's response to the motion to dismiss, defendant testified at his deposition (1) that he financed the Texas condominium through a Houston bank to which he currently makes monthly payments, (2) that as a director of a Texas corporation, Permian Records, Inc., he attended a meeting in Dallas in 1982, (3) that he attended a Texas college for three years, (4) that he had worked in Texas for a total of four and one-half months, during which time he maintained a Texas bank account, (5) that two of his children attend Texas educational institutions, and (6) that he frequently visits his children in Texas, most recently in March, 1983. Defendant's reply does not controvert these assertions of fact, except to state that defendant merely loaned $250,000 to Permian Records and never received any shares of stock in that Texas corporation.

Requirements of Article 2031b

Defendant states that he "does not challenge whether (he) was doing business within the literal definition of TEX. REV. CIV. STAT. ANN. Art. 2031b(4)."[1] Defendant thus concedes that he entered into a contract by mail or otherwise with a resident of Texas to be performed in

1. See the motion to dismiss at 3.

whole or part by either party in this state.[2] This court, therefore, moves directly to the question of due process. See Bennett Industries, Inc. v. Laher, 557 F.Supp. 965, 966 (D.C. N.D. Tex. 1983).

Constitutional Due Process

Defining the limits of due process is a two-pronged inquiry. First, there must be some minimum contact with the state which results from an affirmative act of the defendant. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974). The required act has been described as one by which a defendant purposely avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. See Hanson v. Denckla, 357 U.S. 235 (1958). Secondly, it must be fair and reasonable to require the defendant to come into the state and defend the action. *Cousteau* at 494. The maintenance of the suit must not offend traditional notions of fair play and substantial justice. See International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Defendant's Activities in Texas

Applying these principles of due process to the case at hand, the court finds that by purchasing a condominium in Houston and financing it through a Texas bank, if by no other act, defendant has availed himself of the protection of Texas laws. This act was deliberate, not fortuitous, and the possible need to invoke the benefits

2. Defendant's modifications to the original proposal required the acceptance and signature of plaintiff located in Dallas. See letter dated November 24, 1981 from defendant to plaintiff on the letterhead of Marlin Oil Corporation.

of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise. See *Cousteau* at 496.

Defendant emphasizes that the choice-of-laws provision in the contract between the parties specifies that any disputes over the agreement would be governed by the law of the state in which the contract area was located, i.e. Oklahoma. This is not a factor in determining whether the requisite "minimum contacts" exist. Bennett Industries, Inc. v. Laher at 969. Parties may agree to such a provision merely to curtail expensive and time-consuming wrangles in the area of comparative law. While a choice-of-laws provision may be relevant to the second prong of the Fifth Circuit's due process test, other factors to be discussed militate strongly against it.

As to the second prong, that it not be unfair or unreasonable to require the nonresident to defend in the forum, the court notes that defendant's contacts with Texas on both a business and a personal level have been numerous and substantial. Texas has a legitimate interest in providing a forum for a suit on a contract made in Texas with a Texas resident. The relative inconvenience to defendant of litigating in Texas rather than Oklahoma does not rise to the level of a denial of due process.[3]

While the relative considerations must be balanced and each case must be decided on its own facts, Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952), the Court holds that defendant's motion to dismiss for lack of in personam jurisdiction must be denied.

---

3. Defendant visits Texas to see his children, he visits a high school friend, and he attends the annual football game between University of Texas and the University of Oklahoma. For which team defendant cheers remains a matter of speculation.

Defendant's Motion for a Protective Order

Having rejected defendant's challenge to the exercise of jurisdiction over his person, the court must also deny that portion of defendant's motion for protective order which seeks to limit discovery to jurisdictional issues.

The second portion of defendant's motion requests the court to designate Oklahoma City, Oklahoma, rather than Dallas, Texas, as the appropriate place to depose defendant. The court finds that it would be oppressive to require defendant to leave his work and to travel, at his own expense, from Oklahoma City to Dallas and return in order that plaintiff may conveniently and inexpensively depose defendant. See 4 MOORE'S FEDERAL PRACTICE § 26.70[1.-3] (1983). If plaintiff wishes to depose defendant in the future, then Oklahoma City is the appropriate location to do so.

Thirdly, defendant requests that he not be required on short notice to produce documents at deposition. Although Fed. R. Civ. P. 30(b)(5) authorizes a party to request the production of documents at the taking of a deposition, it provides that "the procedure of Rule 34 shall apply to the request." Rule 34(b) states that, although the court may allow a shorter or longer time, the party upon whom the request is served shall serve a written response within 30 days after service of the request, agreeing to provide the documents or specifying objections.

This court has entered no order shortening the period for response; accordingly, the time periods specified in the relevant rules apply. Defendant need not produce documents on short notice.

Plaintiff's Motion for Sanctions

Plaintiff asserts that defendant failed to produce certain documents at his deposition and, despite numerous requests, has since refused to produce them. Plaintiff's motion implies that the court, in the course of a telephone conference on May 18, 1983 ordered defendant to produce at deposition those documents relevant to defendant's contacts with the State of Texas. The court's notes of that conference read in pertinent part as follows: "Defendant will produce those documents *it deems relevant* to jurisdiction" (emphasis added). That defendant might deem fewer or different documents relevant to jurisdiction than did plaintiff is manifest. The court did not order defendant to produce any specific documents relevant to jurisdiction, nor all documents relevant to it. Thus defendant has not failed to comply with an order of this Court.

Summary

Defendant's motion to dismiss for lack of in personam jurisdiction is DENIED. Plaintiff's motion for sanctions is DENIED. Defendant's motion for a protective order to limit the scope of discovery is DENIED; to designate Oklahoma City as the appropriate place for the taking of defendant's deposition is GRANTED; and to prevent defendant from having to produce documents on shorter notice than that provided by the Federal Rules is GRANTED.

SO ORDERED.

July 29, 1983.

/s/ A. JOE FISH
A. Joe Fish
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-83-0277-G

HOLT OIL & GAS CORPORATION, ET AL.,
Plaintiffs,

v.

RALPH L. HARVEY,
Defendant.

(Filed May 28, 1985)

JUDGMENT

The jury having on this day returned its verdict,

It is ORDERED, ADJUDGED and DECREED:

(1) That plaintiffs recover of defendant the sum of $207,208.64 together with post-judgment interest at the rate of 8.57% per annum until paid in full, as well as reasonable attorneys' fees of $30,000 through trial of this action plus an additional $5,000 if an appeal is taken, and all costs of court;

(2) That defendant take nothing by virtue of his counterclaims in this action, and that these counterclaims be, and hereby are DISMISSED with prejudice;

(3) That the clerk shall transmit a true and correct copy of this judgment to counsel of record;

(4) That plaintiffs have all writs and processes necessary to enforce this judgment; and

(5) That all relief not granted herein is DENIED.

May 28, 1985.

/s/ A. JOE FISH
A. Joe Fish
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1491

D.C. Docket No. CA-3-83-0277-G

HOLT OIL & GAS CORPORATION, ET AL.,
Plaintiffs-Counter Defendants-Appellees,

v.

RALPH L. HARVEY,
Defendant-Counter Plaintiff-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-counter plaintiff-appellant pay to plaintiffs-counter defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 8, 1986

HOLT OIL & GAS CORPORATION
and Faywin Investments, Pty. Ltd.,
Plaintiffs-Counter Defendants-Appellees,

v.

Ralph L. HARVEY,
Defendant-Counter Plaintiff-Appellant.

No. 85-1491.

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1986.

Rehearing Denied Nov. 19, 1986.

Texas oil and gas corporation brought action against Oklahoma oil and gas investor to recover unpaid share of operating expenses for oil and gas drilling venture, and investor counterclaimed for breach of operating agreement. Corporation's interest in law suit was assigned. The United States District Court for the Northern District of Texas, A. Joe Fish, J., denied motion to dismiss for lack of personal jurisdiction, entered judgment on jury verdict in favor of corporation, and denied motion for judgment notwithstanding verdict. Investor appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) investor's contacts with Texas justified exercise of general, personal jurisdiction; (2) evidence created jury questions whether sidetrack well was continuation of initial well and whether investor was liable for operating expenses incurred for that well; and (3) district judge's remarks to investor which warned investor not to give nonresponsive answers and which followed sustained ob-

jections to nonresponsive answers by investor did not rise to level of plain error requiring new trial.

Affirmed.

Roger E. Beecham, Stigall & Maxfield, Benjamin Raye Collier, Mark D. Foster, Dallas, Tex., Fellers, Snider, Blankenship, Bailey & Tippens, Harry H. Selph, II, Oklahoma City, Okl., for defendant-counter plaintiff-appellant.

C. Steven Matlock, Jr., Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., for plaintiffs-counter defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JOHNSON, Circuit Judge:

Ralph Harvey appeals from the district court's judgment in favor of Holt Oil & Gas Company ("Holt") in this diversity action. Finding Harvey's contentions unpersuasive, we affirm the judgment of the district court.

I.

This lawsuit arises out of an ill-fated oil and gas drilling venture in northwestern Oklahoma. The plaintiff, Holt Oil & Gas Company,[1] is a Texas corporation with its principal place of business in Dallas. The defendant,

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1. Holt has assigned its interest in this lawsuit to Faywin Investments Pty., Ltd. In this opinion, our references to Holt will include Holt and/or Faywin Investments.

Ralph Harvey, is an Oklahoma resident who is in the business of investing in oil and gas drilling ventures.

In 1981, Holt filed with the Oklahoma Corporation Commission notice of its intent to drill on certain acreage in Beaver County, Oklahoma. After filing notice, Holt discovered that Harvey owned a one-eighth leasehold interest in the proposed drill site. Holt offered Harvey an opportunity to participate in drilling the well which Harvey accepted thereby acquiring a working interest in the well. After some negotiation, Holt and Harvey executed a Joint Operating Agreement (JOA), the terms of which were to govern the drilling project.

Under the terms of the JOA, Harvey agreed to pay a pro rata share of the costs incurred in drilling an initial well in the Marmaton geological formation. The JOA provided that this well would be drilled "to a true vertical depth of 6,900 feet; or to a depth sufficient to test the Marmaton Lime, . . ." This initial well was designated the "Campbell 1" well. The JOA further provided that if any party sought to drill a subsequent well, or to

> rework, deepen or plug back a dry hole drilled at the joint expense of all parties or a well jointly owned by all the parties and not then producing in paying quantities, the party desiring to drill, rework, deepen or plug back such a well shall give the other parties written notice of the proposed operation, specifying the work to be performed, the location, proposed depth, objective formation and the estimated cost of the operation. The parties receiving such a notice shall have fifteen (15) days after receipt of the notice within which to notify the parties wishing to do the work whether they elect to participate in the cost of the proposed operation.

The Campbell 1 drilling effort encountered numerous difficulties and was ultimately unsuccessful. In December of 1981, after drilling to a depth of approximately 6,700 feet, Holt sent a new drilling prognosis to Harvey which called for sidetracking the Campbell 1 well. Under this prognosis, Holt would use the first 1640 feet of the Campbell 1 well and then directionally drill from that depth to a depth sufficient to evaluate the Marmaton formation. The sidetracking operation was designated "Campbell 1-A."

Harvey, upset by the problem plagued Campbell 1 drilling effort, advised Holt on December 21, 1981, that he would not pay any expenses incurred due to Holt's imprudence and negligence. Harvey also refused to pay any expenses associated with the Campbell 1-A sidetrack operation. The sidetrack operation nevertheless continued until March of 1982 when Holt determined that the Campbell 1-A well was a dry hole. Holt then decided to recomplete the Campbell 1-A well in the Cleveland geological formation. Harvey participated in the recompletion operation which was also eventually unsuccessful. After the recompletion effort failed, Holt plugged the well.

Holt initiated the instant diversity action in the United States District Court for the Northern District of Texas seeking to recover Harvey's unpaid share of the operating expenses. According to Holt, Harvey had breached the JOA by refusing to pay any costs associated with the Campbell 1-A sidetrack operation. Holt also alleged that Harvey had refused to pay some of the costs associated with either the Campbell 1 operation or the Cleveland recompletion operation.

Harvey moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(2) asserting that the court lacked

personal jurisdiction. In a written order issued on July 29, 1983, the district court denied Harvey's motion to dismiss. Harvey then filed an answer and counter-claim asserting, *inter alia,* (1) that the Campbell 1-A sidetrack operation was a "subsequent or other operation" under the terms of the JOA for which Harvey was not liable absent prior approval, and (2) that Holt had breached the JOA by failing to perform drilling operations in a reasonable and prudent manner. Following trial, the jury, in response to a number of special interrogatories, returned a verdict in favor of Holt. The district court denied Harvey's motion for a j.n.o.v. and Harvey filed timely notice of appeal. On appeal, Harvey raises a variety of challenges to the judgment of the district court.

II.

As an initial matter, Harvey contends that the district court erred in failing to dismiss the case for want of personal jurisdiction. The district court properly exercised personal jurisdiction only if Harvey (1) was amenable to service of process under the Texas long-arm statute; and (2) the exercise of jurisdiction under Texas law was consistent with due process. *See Colwell Realty Investments v. Triple T Inns,* 785 F.2d 1330, 1333 (5th Cir. 1986); *Stuart v. Spademan,* 772 F.2d 1185, 1189 (5th Cir. 1985). Because the Texas long-arm statute has been interpreted to extend to the limits of due process, *see Hall v. Helicopteros Nacionales de Colombia, S.A.,* 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds,* 466 U.S. 408, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984); *Colwell Realty,* 785 F.2d at 1333; *Stuart,* 772 F.2d at 1189, our inquiry in the instant case focuses solely on whether the district court's exercise of juris-

diction over Harvey comports with the constitutional requirement of due process.

In order for an exercise of personal jurisdiction to be consistent with due process, the nonresident defendant must have some minimum contact with the forum which results from an affirmative act on the part of the nonresident. *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95 (1945). In evaluating a nonresident's contacts with the forum, we must determine whether the nonresident has purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. The defendant's conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court in the forum state. *See Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958)).

[1, 2] When a court exercises personal jurisdiction over a defendant based on contacts with the forum related to the particular controversy, the court is exercising "specific jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S. Ct. 1868, 1872, 80 L.Ed.2d 404 (1984) (citing von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1138, 1144-64 (1966)). To exercise specific jurisdiction, the court must examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends traditional notions of fair play and substantial justice. *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S. Ct. 2569, 2579, 53 L.Ed.2d 683 (1977). Even where specific jurisdiction is lacking, however, a court may nevertheless

exercise "general jurisdiction" based on a defendant's contacts with the forum unrelated to the controversy. *Helicopteros Nacionales,* 104 S. Ct. at 1872. To exercise general jurisdiction, the court must determine whether "the contacts are sufficiently systematic and continuous to support a reasonable exercise of jurisdiction." *Stuart,* 772 F.2d at 1191 (citing *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S. Ct. 1473, 1480-81, 79 L.Ed. 2d 790 (1984); *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 72 S. Ct. 413, 96 L.Ed. 485 (1952)).

Holt relies on both specific and general jurisdiction to support the district court's exercise of personal jurisdiction over Harvey. We proceed to first examine whether an exercise of specific jurisdiction was permissible. Harvey's only contacts with Texas relating to the instant controversy were as follows: (1) Harvey entered into a contract with Holt, a Texas corporation; (2) Harvey sent a final revised joint operating agreement from Oklahoma to Texas; (3) Harvey sent three checks from Oklahoma to Texas in partial performance of its contractual obligations; and (4) Harvey engaged in extensive telephonic and written communication with Holt.

[3] We conclude that these limited contacts were insufficient to support an exercise of specific jurisdiction. On several occasions this Court has observed that merely contracting with a resident of the forum state is insufficient to subject the nonresident to the forum's jurisdiction. *See, e.g., Colwell Realty,* 785 F.2d at 1334; *Stuart,* 772 F.2d at 1192-93; *see also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed. 2d 528 (1985). Although the contractual relationship between Holt and Harvey may have been cemented in

Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement. *See Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983); *see also Burger King*, 105 S. Ct. at 2187 (discussing relevance of choice of law provision to minimium contacts analysis). Our conclusion is further bolstered by the fact that performance of the contract was centered in Oklahoma rather than Texas. *See id; Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985). Given that the material performance occurred in Oklahoma, the fact that Harvey mailed payments to Texas does not weigh heavily in our determination. *See Patterson*, 764 F.2d at 1147 (all material performance occurred in Mexico despite the wiring of payments to Texas); *C & H Transportation Co. v. Jensen & Reynolds Construction Co.*, 719 F.2d 1267, 1270 (5th Cir. 1983), *cert. denied*, 466 U.S. 945, 104 S. Ct. 1930, 80 L.Ed.2d 475 (1984) (fact that payment mailed to Texas is hardly significant in terms of purposeful availment); *Hydrokinetics*, 700 F.2d at 1029 (nor do we weigh heaviily the mailing of payment checks into the forum).[2] Finally, the exchange of communications between Texas and Oklahoma in the course of developing and carrying out the contract was in itself also insufficient to constitute purposeful availment of the benefits and protections of Texas law. These

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2. *Compare D.J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542, 548-49 (5th Cir. 1985) (necessary part of contract performance involved mailing distributorship packet to forum); *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1010 (5th Cir. 1982) (Mississippi forum clearly the hub of parties' activities); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir. 1974) (an integral, essential portion of performance, delivery of the results in satisfactory form, had to take place in forum).

communications to Texas rested on nothing but "the mere fortuity that [Holt] happens to be a resident of the forum." *Patterson,* 764 F.2d at 1147 (numerous telephone calls from defendant to forum during course of performance insufficient to support specific jurisdiction). *See also Stuart,* 772 F.2d at 1193; *Benjamin v. Western Boat Building Corp.,* 472 F.2d 723, 729 (5th Cir.), *cert. denied,* 414 U.S. 830, 94 S. Ct. 60, 38 L.Ed.2d 64 (1973).

Having concluded that insufficient contacts existed between Texas, Harvey, and the instant controversy to support an exercise of specific jurisdiction, we proceed to consider whether an exercise of general jurisdiction was proper.[3] To do so requires us to explore the nature of Harvey's contacts with Texas to determine whether they constitute the kind of continuous and systematic contacts required to satisfy due process. *See Helicopteros Nacionales,* 104 S. Ct. at 1873. Although the issue is close, we conclude that they do.

Harvey's general contacts with Texas include the following: (1) Harvey attended college and was formerly employed in Texas; (2) Harvey owns real estate in Texas, specifically a condominium in Houston; (3) Harvey has travelled to Texas on numerous occasions to visit his children; (4) Harvey frequently visits Texas for recreation; and (5) Harvey has transacted a great deal of busi-

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3. Our conclusion that "specific" jurisdiction was lacking means only that due process requirements are not satisfied solely by Harvey's contacts with Texas relating to the instant controversy. A finding of no specific jurisdiction in no way precludes us from turning to examine the totality of Harvey's contacts, including all contacts related and unrelated to the present controversy, to determine if "minimum contacts" exist.

ness in Texas. In addition to his transaction with Holt, Harvey has had extensive business dealings with Permian Records of Dallas, Texas. Harvey has been a director of Permian Records and has attended director's meetings in Dallas. Harvey has also invested $250,000.00 in Permian Records. Finally, Harvey is the sole shareholder of Marlin Oil Company. Marlin Oil has drilled several wells in Texas and been involved in litigation in Texas. Harvey has travelled to Texas on several occasions in connection with the activities of Marlin Oil.

[4-6] None of Harvey's various contacts with Texas, alone, would support an exercise of general jurisdiction. For example, Harvey's frequent journeys into Texas for personal and recreational purposes would not by themselves constitute the level of contact which must exist for general jurisdiction to lie.[4] *See generally Laxalt v. McClatchy,* 622 F.Supp. 737, 745 (D. Nev. 1985); *cf. Helicopteros Nacionales,* 104 S. Ct. at 1874 (purchasing trips into the forum insufficient to support assertion of general jurisdiction). Similarly, Harvey's ownership of realty in the forum unrelated to this litigation would not alone support an exercise of general jurisdiction. *See Shaffer v. Heitner,* 433 U.S. 186, 208-10, 97 S. Ct. 2549, 2581-82, 53 L.Ed.2d 683 (1977). Nor would Harvey's status as an investor and former director of a Texas corporation alone be sufficient. *See id.* at 210, 97 S. Ct. at 2585-86.

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4. This Court has, however, recently reaffirmed the continuing existence of transient jurisdiction in certain cases in which the defendant is served while physically present within the forum. *See Amusement Equipment, Inc. v. Mordelt,* 779 F.2d 264, 271 (5th Cir. 1985).

[7] Determining the existence of personal jurisdiction does not, however, involve an examination of each of Harvey's contacts with Texas viewed in isolation from one another. Rather we are required to examine Harvey's contacts *in toto* to determine whether they constitute the kind of continuous and systematic contacts required to satisfy due process. The record reveals that Harvey has maintained constant and extensive personal and business connections with Texas throughout his adult life. These contacts differ both qualitatively and quantitatively from the sort of "random," "fortuitous," or "attenuated" contacts which will not support an exercise of *in personam* jurisdiction. Moreover, we note that the instant controversy arises out of one of Harvey's business contacts with Texas. While that contact was not sufficient to support an exercise of specific jurisdiction, the fact that some connection exists between Harvey, the forum, and the controversy involved in the instant case is nevertheless relevant to our determination.[5] Based on the foregoing analysis, we conclude that Harvey had sufficient minimum contacts with Texas to support an exercise of *in personam* jurisdiction.

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5. Minimum contacts analysis is designed to protect an individual's liberty interest in not being haled into a distant or inconvenient forum. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03, 102 S. Ct. 2099, 2104-05, 72 L.Ed.2d 492 (1982). In *Insurance Corp. of Ireland*, the Court observed that:

> The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

This analysis requires a fact-intensive fairness inquiry for determining whether minimum contacts exist. *See also Madison Consulting Group v. State of South Carolina*, 752 F.2d 1193, 1198-99 (7th Cir. 1985). While the distinction between "general" and "specific" jurisdiction provides an useful analytic device, the use of these categories does not alter the fundamental focus of the minimum contacts inquiry.

We also conclude that maintenance of this action against Harvey in Texas will not offend traditional notions of fair play and substantial justice. The fact that the injured party, Holt, is a resident of Texas provides Texas with a significant interest in providing a forum for this action. *See Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1173 (5th Cir. 1985). Moreover, Harvey was not unreasonably inconvenienced by being required to defend the action in Texas. We note in this regard that Harvey was in Texas during the week this case was tried to participate in a golf tournament. In these circumstances, the district court properly exercised *in personam* jurisdiction.

III.

Having concluded that the district court properly exercised personal jurisdiction, we proceed to consider Harvey's remaining claims. Harvey first asserts that the district court erred in refusing to find as a matter of law that the Campbell 1-A sidetrack was either a "subsequent" or "other" operation under the terms of the JOA. Instead, the district court submitted Question No. 2 to the jury which asked: "Do you find that the Campbell sidetrack was a continuation of the original Campbell 1 well as distinct from subsequent or other operations as defined in the Operating Agreement?" The jury concluded that it was and, consequently, that Harvey was liable for a pro rata share of expenses incurred during the Campbell 1-A operation.[6]

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6. The JOA required prior approval by Harvey before he could be held liable for expenses incurred during the course of subsequent or other operations. Thus, the finding that the Campbell 1-A sidetrack was not a subsequent or other operation was important to the jury's verdict since there was no prior approval by Harvey of the sidetrack.

Harvey is clearly correct in stating that the interpretation of an unambiguous contract is a matter of law to be decided by the court. *See, e.g., Southern Natural Gas Co. v. Pursue Energy,* 781 F.2d 1079, 1081 (5th Cir. 1986). On the other hand, a trial court may conclude that a contract is ambiguous and thus allow the jury to resolve the ambiguity by determining the underlying intent of the parties as a matter of fact. *See id.; Pletz v. Christian Herald Ass'n.,* 486 F.2d 94, 96 (5th Cir. 1973); *Walker v. Telex Corp.,* 583 P.2d 482, 485 (Okla. 1978). Whether a particular contract is ambiguous is a question of law. *Deauville Corp. v. Federated Dept. Stores, Inc.,* 756 F.2d 1183, 1193 (5th Cir. 1985).

[8] Our close examination of the contract provisions at issue in the instant case reveals that the Campbell 1-A sidetrack was not clearly and unambiguously a subsequent rather than initial operation under the terms of the JOA. In discussing the "initial well," the JOA states that:

> Operator shall commence the drilling of a well for oil and gas at the following location . . . and shall thereafter continue the drilling of the well with due diligence to a true vertical depth of 6,900 feet; or to a depth sufficient to test the Marmaton Lime, . . .

The JOA defines subsequent operations to include "any well on the Contract Area other than [the initial well]" or any operation intended to "rework, deepen or plug back a dry hole [or a well] not then producing in paying quantities. . . ." The provision defining subsequent operations does not mention sidetrack operations. A sidetrack could be considered a well "other than the initial well." On the other hand, the provision for an initial well indicates an intent to drill as necessary to test the Mar-

maton formation. The Campbell 1 operation resulted in an incomplete test of the Marmaton formation because the hole was lost. The sidetrack operation could be considered merely a continuation of the initial test effort. Much of the testimony at trial was devoted to resolving this ambiguity.[7]

[9] Similarly, the sidetrack operation was not clearly and unambiguously an "other" operation under the JOA. Article VII of the JOA dealing with expenditures for other operations states that:

> Operator shall not undertake any single project reasonably estimated to require an expenditure in excess of $10,000, *except in connection with a well,* the drilling, reworking, deepening, completing, recompleting or plugging back of which has been *previously authorized* by or pursuant to this agreement. . . ." (emphasis added).

The application of this provision to the Campbell 1-A sidetrack presents the same ambiguity as the "subsequent operations" provision. If the sidetrack was a continuation of the initial well, then Article VII(D) might well be inapplicable. Article VII(D) expressly excepts from its coverage the drilling of a previously authorized well. We note in this regard that the emphasis throughout Article VII(D) appears to be on expenses incurred during the course of *subsequent operations.* If, in contrast, the sidetrack was a second well, then Article VII(D) would apply.

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7. The provision defining subsequent operations also includes any operation intended to rework a dry hole or a well not producing in paying quantities. The provision does not, however, address an operation like that in the instant case which was intended to rework a lost hole as part of the initial test effort.

Much of Harvey's brief is devoted to detailing extrinsic evidence supporting Harvey's interpretation of the JOA. We conclude, however, that under the *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), standard, more than sufficient evidence exists in the record to support the jury's finding that the sidetrack was not a subsequent or other operation. In particular, we note that several witnesses testified that the Campbell 1-A sidetrack was a continuation of the original well rather than a subsequent or other operation. *See* Record Vol. VIII at 387, 471, 524-27; Record Vol. X at 70.[8]

IV.

[10] Holt claimed the same damages on the same facts under both its breach of contract and quantum meruit theories of recovery. After finding Harvey liable to Holt, the jury awarded damages of $207,136.64 for breach of contract but awarded nothing for quantum meruit. On appeal, Harvey contends that the jury's findings on damages are hopelessly inconsistent entitling him to a new trial.[9] We disagree.

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8. We are unable to locate any indication in the record that Harvey raised his "divisible contract" claim before the district court. Even if he did, however, that claim appears to be merely a variation of his "other operation" argument already rejected by this Court.

9. Harvey has not waived the issue by failing to object at the time the jury returned its verdict. If answers to jury interrogatories are in irreconcilable conflict, then the trial judge lacks authority to enter judgment based upon those answers. Failure to contemporaneously object does not waive the right to assert the alleged irreconcilable conflict in a motion for a new trial. *See Brunner v. Maritime Overseas Corp.*, 779 F.2d 296 (5th Cir. 1986). Nevertheless, the better practice is to object when the jury returns its verdict so that the trial judge can evaluate whether to send the case back to the jury at that point for reconsideration.

[11] While inconsistent jury responses to special interrogatories would require remanding the case for a new trial, answers are inconsistent only if irreconcilable. *Willard v. The John Hayward,* 577 F.2d 1009, 1011 (5th Cir. 1978). We have no difficulty reconciling the jury's verdict in the instant case. The jury might well have concluded that Holt would unjustifiably receive a double recovery if damages were awarded under both theories of recovery.

V.

Harvey next contends that he is entitled to a new trial because of certain prejudicial remarks made by the district judge during trial. To support this assertion, Harvey cites the following statement by the trial judge:

> Mr. Harvey, I don't know how to say this any more clearly than I had attempted to on several previous occasions. I think I am going to have to give you some incentive to obey my directive. So next time I sustain an objection to a non-responsive answer, it's going to cost you some money. Have I made that clear? The question is what your criticism was. We didn't need a dissertation on how failure to keep a rig or pump or hole clean can cause problems in drilling generally. We want to try this lawsuit, this dispute, what you know about it, not tell us all your knowledge as an expert geologist, or whatever you are, as far as Beaver County is concerned.

Record Vol. VII at 173. We conclude that this remark does not entitle Harvey to a new trial.

A federal trial judge is far from a figurehead or passive arbitrator. The judge has an obligation to conduct an orderly trial. In carrying out this responsibility, the trial

judge is empowered to keep the case moving within the bounds of reason. *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 471 (5th Cir. 1985). A witness' continued failure to make responsive answers to questions may require a judicial reprimand of the witness. *Cf. Miley v. Delta Marine Drilling Co.*, 473 F.2d 856, 857 (5th Cir.), *cert. denied*, 414 U.S. 871, 94 S. Ct. 93, 38 L.Ed.2d 89 (1973).

[12, 13] Harvey did not object to the trial judge's remark at trial. Consequently, our review is limited to review for plain error. *Dixon v. International Harvester Co.*, 754 F.2d 573, 585 (5th Cir. 1985). The trial judge's reprimand of Harvey followed numerous instances in which the trial judge had sustained objections to non-responsive answers by Harvey. *See* Record Vol. VI at 30, 38, 39, 40, 61, 64, 72, 73, 102; Record Vol. VII at 131, 149, 164, 166, 170, 172. On four prior occasions the court had specifically requested that Harvey answer questions as directly and precisely as possible. Record Vol. VI at 40, 61, 73; Record Vol. VII at 166. It was only after these requests failed that the district court reprimanded Harvey. Thus, the district court's remarks were made in furtherance of the court's responsibility to "keep the trial moving." The remarks clearly did not rise to the level of plain error.

VI.

Holt alleged at trial that Harvey had breached the JOA by failing to pay his proportionate share of the cost of drilling, completing, and operating the Campbell well. Harvey asserts on appeal that the district court erred in not submitting an interrogatory to the jury expressly inquiring into whether Harvey breached the JOA. We con-

clude, however, that Harvey's challenge to the form of special interrogatories is without merit.

[14] A trial court has wide discretion in formulating special interrogatories to the jury. *E.g., Armco Indus. Credit Co. v. SLT Warehouse Co.,* 782 F.2d 475, 483 (5th Cir. 1986); *Dobbs v. Gulf Oil Co.,* 759 F.2d 1213, 1215 n. 3 (5th Cir. 1985); *Litman v. Massachusetts Mutual Life Ins. Co.,* 739 F.2d 1549, 1560 (11th Cir. 1984); C. Wright & A. Miller, *Federal Practice and Procedure* § 2506 (1971 & 1986 Supp.). The trial court may, for example, properly divide a single ultimate fact issue into separate components with separate factual questions submitted regarding the various components in dispute. *See Gulf Coast Fans v. Midwest Electronics Importers,* 740 F.2d 1499, 1509-10 (11th Cir. 1984).

[15] Here, the jury found in response to Question No. 2 that the Campbell 1-A sidetrack was a continuation of the original Campbell 1 well and not a "subsequent operation" or "other operation" under the JOA. In response to Question No. 3, the jury found that Harvey consented to completing the Campbell 1-A, recompleting the Cleveland formation, and operating the Campbell 1-A. Finally, in response to Question No. 4, the jury found that Harvey failed to pay his proportionate share of the costs associated with drilling the Campbell 1 and 1-A, recompleting the Cleveland formation, and operating the Campbell 1 and 1-A. Thus, the jury found in favor of Holt on all disputed factual issues underlying Holt's breach of contract claim. The jury's responses to Questions 2, 3 and 4, read together, required the jury to determine the ultimate factual issue, *i.e.,* whether Harvey breached the JOA. An additional interrogatory expressly

asking whether Harvey breached the JOA was unnecessary.

VII.

Harvey's counterclaim alleged that Holt had breached the JOA by failing to conduct operations in a good and workmanlike manner and that this failure constituted gross negligence. Harvey further alleged that Holt's conduct violated an implicit covenant to conduct operations in a prudent manner. According to Harvey, Holt's conduct not only precluded Holt from obtaining a money judgment on its breach of contract claim, but entitled Harvey to recover a judgment from Holt. The jury disagreed. In response to special interrogatories, the jury found that Holt performed its duties as operator of the Campbell well in a reasonable and prudent manner. The jury also refused to find gross negligence on the part of Holt.

[16] Harvey's final contention on appeal is that these jury findings are contrary to the great weight of the evidence and, consequently, that the district court erred in refusing to grant Harvey's motion for a j.n.o.v.[10] Our standard of review on this issue is limited. A party is entitled to a j.n.o.v. only "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. . . ." *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). In evaluating the evidence, the *Boeing* standard requires this Court to "consider all the evidence and in the light and with all

---

10. At the close of trial, Harvey moved for a directed verdict, thus preserving his challenge to the sufficiency of the evidence. *See Scheib v. Williams-McWilliams Co., Inc.*, 628 F.2d 509, 512 (5th Cir. 1980).

reasonable inferences most favorable to the nonmover." *Thornton v. Gulf Fleet Marine Corp., Inc.*, 752 F.2d 1074, 1076-77 (5th Cir. 1985).

[17] Examining all the evidence in the light most favorable to Holt, we find ample evidence to support the jury's finding that Holt performed its duties as operator in a reasonable and prudent manner. Holt's former drilling engineer, Bryan Bellew, testified that in his opinion Holt had not in any respect been negligent or imprudent in connection with the Campbell well. Record Vol. VIII at 390-93. Two other petroleum engineers also testified that Holt had not been imprudent, negligent, or grossly negligent in connection with the Campbell well. Record Vol. VIII at 461-77, 534-40. This testimony, although far from undisputed, was sufficient to support the jury's findings.

VIII.

Having rejected all of Harvey's contentions raised on appeal, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1491

HOLT OIL & GAS CORPORATION, ET AL.,
Plaintiffs-Counter Defendants-Appellees,

v.

RALPH L. HARVEY,
Defendant-Counter Plaintiff-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(November 19, 1986)

Before WISDOM, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

11-17-86

APPENDIX B

PLAINTIFF'S EXHIBIT 14

HOLT OIL & GAS CORPORATION
8150 North Central Expressway
Suite 1255, Campbell Centre II
Dallas, Texas 75206

Telephone (214) 691-1598
Telex 73-2617

November 18, 1981

Marlin Oil Company
2700 First National Center
Oklahoma City, Oklahoma 73102

ATTN: Larry Gordon

Re: Campbell Prospect
Beaver County, Oklahoma

Dear Larry:

Enclosed please find an invoice, short letter agreement and an operating agreement. The invoice reflects your unpromoted share of acreage, overhead and AFE dry hole costs. The letter agreement in duplicate and the two operating agreement signature pages have been executed by our president, Ron Dickson. Please return one executed letter agreement and one executed signature page to the operating agreement.

We would appreciate you directing this matter to the immediate attention of Mr. Harvey due to our well being in progress. Though obviously an awkward situation, at

this stage we are trying to make the best of extenuating circumstances.

We thank you in advance for your help and cooperation.

Yours truly,

/s/ TYRRELL HEARN
Tyrrell Hearn

enclosures

TH/mp

HOLT OIL & GAS CORPORATION
8150 North Central Expressway
Suite 1255, Campbell Centre II
Dallas, Texas 75206

Telephone (214) 691-1598
Telex 73-2617

November 18, 1981

NOTE: This letter was never executed!

Mr. Ralph L. Harvey
Marlin Oil Company
2700 First National Center
Oklahoma City, Oklahoma 73102

Re: Campbell Prospect
Beaver County, Oklahoma

Dear Mr. Harvey:

This letter, when executed by both parties, will constitute an agreement between Holt Oil & Gas Corporation ("Holt"), and Ralph L. Harvey ("Harvey").

Holt is the owner of a 7/8 leasehold interest with respect to the rights from the surface down to the base of the Marmaton in the above referenced Campbell Prospect, more specifically described as those 160 acres in the Southwest Quarter (SW/4) of Section 11, Township 2 North, Range 23 East CM, Beaver County, Oklahoma.

Harvey is the owner of the outstanding 1/8 leasehold interest with respect to the rights from the surface down to the base of the Marmaton in the aforementioned property. Upon execution of this agreement, Harvey elects

to participate in Holt's Campbell Prospect as a working interest owner.

Harvey agrees to pay Holt $30,850.00 upon execution of this agreement for Harvey's prorata share of acreage, evaluation, legal, overhead, and dry hole costs. This invoice reflects our costs on an unpromoted basis. In the event the dry hole costs exceed the AFE dry hole costs, Holt will invoice Harvey for the additional amount. If the dry hole costs are less than the AFE dry hole costs, Harvey's prorata share will be credited toward his share of completion costs or refunded.

Holt, as Operator, shall make diligent effort to drill an exploratory well on the above described acreage and shall operate said well and be judged by the "reasonable and prudent operator" standard.

Holt includes a Joint Operating Agreement to cover joint operations on the subject property.

It is not the purpose or intention of this agreement to create, nor shall same be construed as creating, any mining partnership or other partnership relation, nor shall the operations of the parties hereto be construed as a joint venture. The liability of the parties hereto shall be several and not joint or collective.

The rights of either party hereto may be assigned in whole or in part but must be made subject to the terms of this agreement.

This agreement shall be deemed performable at Dallas, Texas, and all sums agreed to be paid by Harvey to Holt shall be payable at the offices of Holt, 8150 North Central Expressway, Suite 1255, Dallas, Texas 75206. All actions to construe or enforce this agreement shall be brought

and maintained in the appropriate state court and venue shall lie in Dallas County, Texas.

Upon execution by both of the parties hereto in the spaces provided below, this agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors and assigns.

Yours truly,

HOLT OIL & GAS CORPORATION

By: /s/ RONALD T. DICKSON
Ronald T. Dickson, President

AGREED TO and ACCEPTED

this ____ day of _____, 1981.

By: _____
Ralph L. Harvey

HOLT OIL & GAS CORPORATION
8150 North Central Expressway
Suite 1255, Campbell Centre II
Dallas, Texas 75206

Telephone (214) 691-1598
Telex 73-2617

November 18, 1981

Mr. Ralph L. Harvey
2700 First National Center
Oklahoma City, OK 73102

Invoice No. 246

CAMPBELL PROSPECT
Campbell #1

Your (unpromoted) 12.50% share	
— acquisition, evaluation, legal and overhead	— $ 1,875.00
— acreage	— 1,500.00
A.F.E. No. 1031 — Dry-Hole Costs: (Unpromoted)	— $27,475.00
TOTAL (Unpromoted)	$30,850.00

A.A.P.L. FORM 610-1977

MODEL FORM OPERATING AGREEMENT

RALPH L. HARVEY
Non-Operator

OPERATING AGREEMENT

DATED

November 18, 1981,

OPERATOR HOLT OIL & GAS CORPORATION

CONTRACT AREA CAMPBELL PROSPECT

The Southwest Quarter (SW/4) of Section 11, Township 2 North, Range 23 East CM,

COUNTY OF BEAVER STATE OF OKLAHOMA

* * *

ARTICLE XIV.

COMPLIANCE WITH LAWS AND REGULATIONS

A. Laws, Regulations and Orders:

This agreement shall be subject to the conservation laws of the state in which the committed acreage is located, to the valid rules, regulations, and orders of any duly constituted regulatory body of said state: and to all other applicable federal, state, and local laws, ordinances, rules, regulations, and orders.

B. Governing Law:

The essential validity of this agreement and all matters pertaining thereto, including, but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located. If the Contract Area is in two or more states, the law of the state where most of the land in the Contract Area is located shall govern.

* * *

PLAINTIFF'S EXHIBIT 15

MARLIN OIL CORPORATION
2700 First National Center
Oklahoma City, Oklahoma 73102
405/232-3267

Ralph L. Harvey, President

Larry J. Gordon, Vice President
Mgr. - Land Dept.

November 24, 1981

Holt Oil & Gas Corporation
Campbell Center II, Suite 1255
8150 North Central Expressway
Dallas, TX 75206

Attention: Mr. Tyrrell Hearn

RE: SW/4 Section 11-2N-23ECM
Beaver County, Oklahoma

Gentlemen:

Receipt is acknowledged of your letter dated November 18, 1981, in which you enclosed your invoice No. 246, two copies of a Letter Agreement, and an Operating Agreement pertaining to the captioned unit. I am hereby rejecting the letter agreement and invoice submitted, as I am willing to participate and pay my pro-rata share of the drilling expenses, including the drilling title opinion, so long as the invoices are accompanied with a copy of the back-up invoices. I am unwilling to pay for the drilling

and completion charges in advance, and any part of Holt's acquisition, evaluation, legal and acreage costs. I am willing to sign the Operating Agreement submitted subject to the following changes:

1) Article IV B. Loss of Title:

   a) Subsections 1 and 2: The original text of the Operating Agreement shall be reinstated.

   b) Subsection 3: Shall be amended to read as follows: "3. Other Losses: All losses incurred, other than those set forth in Article IV B.1 and IV B.2 above, shall not be considered failure of title, but shall be individual losses and shall be borne by the parties in the same manner as outlined in Article IV, Section B, Subsection 1.

2) Article V C. Employees: The original text of the Operating Agreement shall be reinstated.

3) Article VI A. Initial Well: As the well has already been spudded, change this from a location selected by the Operator to the C SE/4 SW/4 of Section 11-2N-23ECM, Beaver County, Oklahoma.

4) Article VI B. Subsequent Operations: Shall be deleted in its entirety and the attached Article VI B shall be used.

5) Article VI E. Abandonment of Wells: To remain consistent with the deletion on Page 8, Line 1, the sentence beginning in the middle of Page 7, Line 67 shall be deleted in its entirety.

6) Article VII D. Limitations of Expenditures: Subsection 3, Page 9, Lines 30 and 38. The twenty

thousand dollars shall be changed to ten thousand dollars.

7) Article VII F. Rentals, Shut-in Well Payments and Minimum Royalties: Page 9, Lines 57, 58, 59 and 60: The original text of the Operating Agreement shall be reinstated.

8) Article XIII Term of Agreement: Option 1 shall not be used, but Option 2 shall be used subject to the following changes:

   a) Page 14, Line 4: The time frame of 120 days shall be used.

   b) Page 14, Line 11: The time frame of 120 days shall be used.

9) Article XV Other Provisions: All other provisions shall be deleted.

10) Exhibit "A" shall be amended as follows:

    IV. Add Mr. Harvey's telephone number: 405-232-3267

11) Exhibit "C" II Direct Charges: Subsection 1. The phrase "plus consultants' fees for maintaining delay rentals and lease records", shall be deleted.

I am willing to participate in the drilling of the #1 Campbell in the SE/4 SW/4 of the captioned section, and I have enclosed your A.F.E. subject to the above changes to Holt's proposed Operating Agreement. This offer to participate will terminate on the date the No. 1 Campbell reaches total depth if I have not received confirmation of Holt's acceptance of these changes. If these

changes are acceptable, please sign and return one copy of this letter to my office.

Respectfully,

/s/ RALPH L. HARVEY
Ralph L. Harvey

RLH/ph

The above changes are agreed to and accepted this ____ day of _____, 1981.

HOLT OIL AND GAS CORPORATION

By: _____

APPENDIX C

EXCERPTS FROM THE DEPOSITION OF
RALPH L. HARVEY

BEFORE THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

May 26, 1983

Oklahoma City, Oklahoma

* * *

[2]

. . .

Q. Mr. Harvey, would you state your full name, please.
A. Ralph L. Harvey.
Q. Mr. Harvey, what is your age?
A. Forty-nine.
Q. And what is your address?
A. Oklahoma City.

. . .

Q. All right, that's fine. How long have you lived in Oklahoma City?

A. For—Well, most of all my life, nearly all my life. I was born in Eastern Oklahoma and my parents moved here when I was two, and except—

Q. What city in Oklahoma?

A. Spiro, Oklahoma, is where I was born.

Q. And you say your parents moved to Oklahoma City when you were two?

A. Yes.

[3]

Q. And have you lived in Oklahoma City since that time?

A. This has been my place of residence, except for a very short time right after college.

Q. And where did you go to college?

A. I went to—graduated at the University of Oklahoma with a master's degree.

Q. Did you go to college anywhere else besides the University of Oklahoma?

A. Yes, I had some undergraduate work at Abilene Christian University.

Q. Was that in Abilene, Texas?

A. Yes.

Q. And how long did you go to Abilene Christian University?

A. For three years.

Q. Was it at that time known as Abilene Christian College?

A. Yes, it was.

Q. What years did you attend Abilene Christian College?

A. The fall of '52 through—through the spring of '55.

[9]

. . .

Q. All right. Mr. Harvey, have you ever been to Texas?

A. Certainly. I go nearly every year to the football game.

Q. How often do you go to Texas?

A. Oh, not very often, I generally try to get

[10]

there to the football game with O.U.-Texas and, oh, I'll occasionally go down to visit my son and then friends.

[11]

. . .

Q. All right. Okay. Have you ever driven a motor vehicle in Texas?

A. When I—On my visits there.

Q. Mr. Harvey, have you ever sued anyone in Texas?

A. No.

Q. Have you ever been sued in Texas besides this present lawsuit?

A. No.

[15]

. . .

Q. How about any bank accounts? Do you have any bank accounts now in Texas?

A. No.

Q. Have you ever?

A. I did when I was in college, I think; but I'm not sure; I'm not even sure whether I had then.

Q. Since that time, have you ever had a bank

[16]

account in Texas?

A. For one three-month period right after I went to

work for Shell Oil Company, I lived in Wichita Falls for six weeks, and then later on that same year, I guess it was the next year, they transferred me to—transferred me out of state and then back to Ozona, Texas, for three months, and I am sure I had a bank account in Ozona for that three months. That would have been in 1959 and '60.

Q. Other than that, have you had any bank accounts in Texas—

A. No.

Q. —that you can recall?

A. No. In '60 I was transferred back to Oklahoma City, and I have been here ever since.

. . .

Q. . . . Well, let's go back. Did you have any jobs while you were at Abilene Christian, while you were in college?

A. I had jobs here in the summer.

Q. All right. Did you have any other jobs in Texas at that time or any jobs in Texas at that time?

[17]

A. I roughnecked for—while I was—right after I was first married and I had to drop out of school and—

Q. When you say roughnecked, you mean you worked on an oil rig. Worked on an oil rig out around Abilene, or several oil rigs?

Q. How long did you do that?

A. It was a period of just several months there, this was in 1956, '55, '56, 1956, while she was going to school.

Q. "She" being your wife?

A. Yes. She was graduating, so she could put me through, and, in the meantime, I worked, and I held, you know, just one rig to another and then I sold cars for a couple of months, I think, too, down there.

Q. Was that in Abilene?

A. Yes. In 1956. All of that happened from January of '56 through August of '56, whatever that period of time right there, I was in and out of work all during that eight-month period, looking for a job or working.

Q. What is you wife's name?

A. Maxine.

Q. And where is she from?

[18]

A. She is from Spur, Texas.

[36]

Q. Any other corporations that you are a director or officer of?

[37]

A. Oh, yes, I've got several corporations in relation to my business.

Q. In relation to Marlin Oil?

A. Yes.

Q. Subsidiaries?

A. Oh, they are separate corporations; I own them all.

Q. About how many, do you know?

A. We have got Marlin Oil & Gas Properties, Inc., and Turnkey Supply, Inc. and Petro Energy Consultants, Inc., and Alpha Marlin Oil Corporation; I don't own all of that one.

Q. How much of that one do you own?

A. 95 percent.

[38]

. . .

Q. Are all four of those Oklahoma corporations?
A. Yes.

[39]

. . .

Q. Are any of those corporations licensed to do business in Texas?
A. Of those listed there, no.
Q. They are not?
A. No.
Q. Do they do any business in Texas?
A. No. . . .

[40]

. . .

Q. Marlin Oil Corporation is licensed to do business in Texas, is it not?
A. Yes.
Q. In fact, it became—you obtained a license to do business in Texas on January 15 of

[41]

1980?

. . .

THE WITNESS: The corporation did, in order to drill one well.

[43]

. . .

Q. Did you, personally, oversee the drilling of any of those wells?

A. No.

Q. Did you ever go to Texas?

[44]

. . .

A. I went down on the logging of one—the second well in Stephens County. That's the only time.

[70]

. . .

Q. Going back to the land in which you have an interest in Beaver County, Oklahoma, is that the only real estate you own in Oklahoma?

A. No, I have got interest all over Oklahoma.

Q. With respect to the Campbell prospect in Beaver County, Oklahoma, what is your interest in that property?

A. I had an eighth, had or have, I don't know what the—I would have to check the title now that that well has been plugged. I had an eighth interest.

Q. Leasehold interest?

A. An eighth leasehold interest in that 80-acre tract, I believe it was.

. . .

Q. You, personally, own that land; is that correct?

A. Yes.

[75]

. . .

Q. Has Marlin Oil Corporation ever been sued?

A. In the state of Texas?

Q. Ever.

A. Oh, yes, we have been sued, if you are in business very long, somebody is going to sue you.

Q. Has the corporation ever been sued in Texas?

A. Yes, one time.

Q. Do you recall when that was?

A. Over that Stephens County property. It seemed like it was in—seemed like it was in '81 when it started.

Q. Were they sued in Stephens County?

A. Yes.

Q. Did you go to Texas for that lawsuit?

A. Yes, I went to Stephenville or Graham, I don't remember, seemed like it was Stephenville, that must be the county seat where they had the—

[76]

had to go down and talk about that lawsuit.

Q. Did you testify at the trial?

A. There was no trial.

Q. You were the defendant in that action—

A. Yes.

Q. —Marlin Oil Company was the defendant?

A. Yes.

Q. Has Marlin Oil Corporation ever initiated a lawsuit in Texas?

A. No.

Q. So that one lawsuit—excuse me?

A. We hadn't hardly done any business in there, so—

Q. So the lawsuit you just described? Stephens County is the only lawsuit that Marlin Oil Corporation was involved in in Texas?

A. Yes.

Q. How about any of your other corporations, have they been involved in lawsuits?

A. No.

Q. Was it in state or federal court the lawsuit which I referred to in Stephens County?

A. You think it was in state; it was in district court, I believe, had it gone to trial.

Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1375

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

RALPH L. HARVEY,
Petitioner,

v.

HOLT OIL & GAS CORPORATION and
FAYWIN INVESTMENTS PTY. LTD.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. Steven Matlock, Jr.
Jackson, Walker, Winstead,
Cantwell & Miller
6000 InterFirst Plaza
901 Main Street
Dallas, Texas 75202
(214)953-6053

Counsel for Respondents

Of Counsel:
Patricia J. Kendall

March 20, 1987

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Ralph L. Harvey and the Respondents Holt Oil & Gas Corporation and Faywin Investments Pty. Ltd. Respondents have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Petition - Petition for Writ of Certiorari

NO. 86-1375

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

RALPH L. HARVEY,
Petitioner,

v.

HOLT OIL & GAS CORPORATION and
FAYWIN INVESTMENTS PTY. LTD.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Holt Oil & Gas Corporation and Faywin Investments Pty. Ltd., submit this response in opposition to Ralph L. Harvey's Petition for Writ of Certiorari to the United States Court of Appeals for the

Fifth Circuit.[1] The opinion below is reported at 801 F.2d 773 (1986).

SUMMARY OF ARGUMENT

Ralph L. Harvey, petitioner for a writ of certiorari before this Court, presents a single question for review. The single question Harvey poses is "[w]hether due process permitted a court in Texas to assert in personam jurisdiction over a resident of Oklahoma in a contract action despite a clause in the contract that selected Oklahoma as the forum for disputes."

---

1. Holt Oil & Gas Corporation assigned its interest in this lawsuit to Faywin Investments Pty. Ltd. In accord with the practice followed throughout these proceedings, Respondents will be referred to simply as "Holt" and Petitioner as "Harvey." The Petition for Writ of Certiorari will be referred to as the "Petition."

(Petition at I). This question is improper for review by this Court for the following reasons:

I) Harvey completely mischaracterizes the contract clause in question. The contract clause is a choice-of-law clause, not a forum selection clause. The parties agreed to apply Oklahoma law to resolve disputes pertaining to their agreement; they did not agree on a forum in which to bring suit.

II) The issue here presented by Harvey was not properly preserved or considered below. Harvey did not argue below, to either the trial or appellate court, that this obvious choice-of-law clause was a forum selection clause. Harvey cannot now rewrite the contract

and ask this Court to interpret unambiguous contractual language. By attempting to do so, Harvey brings before this Court a routine, fact specific inquiry on contract construction and interpretation not raised below which would necessitate this Court engage in fact finding on issues for which no evidence exists in the record. Furthermore, the question Harvey poses for review is actually an argument for improper venue which Harvey waived by not raising in his pre-answer motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b).

III) No due process concerns are implicated by Harvey's Petition.

IV) In all respects, this decision fully accords with decisions in other

courts, precluding Harvey's claim of conflict among the circuit courts.

In summary, Harvey's Petition for Writ of Certiorari presents no proper question worthy of review by this Court.

STATEMENT OF THE CASE

The opinion of the appellate court fairly summarizes the pertinent facts in this case.

Harvey's Petition "restricts itself solely to the question whether a federal court sitting as a court of Texas properly asserted in personam jurisdiction over a citizen of Oklahoma in a dispute arising out of oil exploration in Oklahoma that took place under a contract that selected Oklahoma procedure to 'determine' remedies for breach" (Petition at 2-3); therefore,

most of the factual allegations in Harvey's statement of the case are not germane to the issue presented for review. For this reason, Holt will not burden the Court with a discussion of the various errors in the factual statement of the Petition. However, as discussed infra, Holt takes issue with Harvey's contention that Oklahoma was selected as the "forum" for suits. (Petition at 3). Holt contends the contract merely required the trial court to apply the substantive law of Oklahoma and this is exactly what the court did at the trial of this case.

REASONS FOR DENYING THE WRIT

I.

HARVEY MISCHARACTERIZES A CHOICE-OF-LAW CLAUSE AS A FORUM SELECTION CLAUSE

This Court should deny Harvey's

Petition for the simple reason Harvey misconstrues a clear and unambiguous choice-of-law clause, attempting to portray it as an exclusive forum selection clause. The relevant clause states as follows:

> B. Governing Law: The essential validity of this agreement and all matters pertaining thereto, including, but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located. . . .[2]

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[2]. The law of the state in which the "Contract Area" is located is the law of Oklahoma.

(Harvey App. 38a). As the Court can plainly see, this clause is patently and expressly a choice-of-law clause appointing Oklahoma law as the "governing law" on all issues pertaining to the parties' agreement.

Harvey confuses three distinct concepts: choice-of-law, forum selection and consent to jurisdiction. Choice-of-law is the only concept relevant to this contract. Merely selecting which state's law will govern a business relationship is not a de facto agreement to submit to the jurisdiction of that court, absent an "express contractual understanding to that effect." See Agrashell, Inc. v.

Bernard Sirotta Co., 344 F.2d 583, 588 (2d Cir. 1965).[3]

The unassailable rule of contract construction provides that language will be given its ordinary meaning, unless a different meaning was clearly intended. See 3 A. Corbin, Contracts §542 (1960). Yet, throughout his Petition, Harvey selectively quotes from this provision the words "procedures" and "determined" in a constrained effort to persuade this Court that the provision is a forum selection provision. By rearranging the syntax of this provision, Harvey

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3. Parties may well agree to a choice-of-law provision simply to curtail potentially expensive and time consuming problems of comparative law. See Bennett Industries, Inc. v. Laher, 557 F.Supp. 965, 968 (N.D. Texas 1983).

cannot succeed in altering the ordinary meaning of the language of this provision which remains simply and unambiguously a choice-of-law clause, duly honored by the parties and the trial court.

Harvey illustrates his confusion by asserting the result below nullifies this Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). At issue in the landmark Bremen decision was the enforceability of a forum selection clause in a maritime towage contract between an American plaintiff and a German defendant. Bremen, however, is inapplicable to this case. The operable contract clause in Bremen was a bona fide forum selection clause

which stated, "[a]ny dispute arising must be treated before the London Court of Justice." Id. at 2 (emphasis supplied). Simply comparing the Bremen clause and the Holt-Harvey clause reveals the Holt-Harvey contract selects the governing law and nothing more.

Harvey's reliance on National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964), is similarly misplaced. Szukhent stands for the proposition that by appointing an agent for service of process in the forum, "parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ." Id. at 316.

Thus, Szukhent permits parties to consent to jurisdiction in places where jurisdiction would not otherwise exist. Szukhent does not limit suit to a particular forum under a forum selection clause, nor does it base jurisdiction on a choice-of-law provision.

Harvey cites no case, and Holt has found none, in which a choice-of-law clause, similar to the one at issue here, has been interpreted as a forum selection clause. Indeed, absent an express statement limiting place of suit to a specifically identified forum, courts consistently refuse to construe choice-of-law clauses as either consent to jurisdiction clauses

or forum selection clauses.[4]

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[4]. For example, in Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956 (5th Cir. 1974), the contract stated "[t]his agreement shall be construed and enforceable according to the law of the State of New York and, the parties submit to the jurisdiction of the courts of New York." The Fifth Circuit held this was not a mandatory forum selection clause, and the parties had not waived their right to sue or be sued outside New York; they had merely agreed to submit to the jurisdiction of New York courts if sued there. Similarly, in Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985), jurisdiction was maintained in Florida even though the parties agreed the "place of jurisdiction is Sao Paulo/Brazil." The Eleventh Circuit construed the parties' agreement as nonexclusive consent to jurisdiction in Brazil, not as a mandatory forum selection clause. In Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1399-1400 (9th Cir. 1986), the Ninth Circuit held the parties' choice-of-law provision, stating the contract would be "governed under the laws of the Cayman Islands, British

[Footnote continued on following page]

Moreover, the cases indicate that even a forum selection clause will not be enforced unless it uses mandatory language requiring disputes "shall" or "must" be brought in a specified locale. Compare Bremen, 407 U.S. at 2 ("Any dispute arising must be treated before the London Court of Justice.") and Scherk v. Alberto-Culver Co., 417 U.S. 506, 508 n.1 (1974) ("All arbitration proceedings shall be held in Paris, France.") (emphasis supplied) with McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 346 (8th Cir. 1985), cert. denied, 106

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West Indies," would not alone suffice to block jurisdiction in California where defendant maintained sufficient jurisdictional contacts.

S.Ct. 347 (1985) (contract disputes "should" be resolved through Iranian courts unenforceable as merely a preference) (emphasis supplied).

In summary, the clause in this case is nothing more than a choice-of-law clause, which will not restrict the parties to Oklahoma as the forum for suit.

II.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

A. Harvey did not Assert this Clause was a Forum Selection Clause Below

Until now, this clause has been consistently regarded by the parties and courts as an ordinary choice-of-law clause. Harvey suddenly imposes a novel and constrained

reading on this clause in an attempt to persuade this Court that Holt and Harvey agreed to apply Oklahoma "procedures" to resolving disputes. By shedding a new, albeit artificial, light on the reading of this provision, Harvey, at best, has manufactured a question of interpretation and construction as to the meaning of a contract provision. Yet, Harvey has never before raised this ordinary fact-bound question of contractual interpretation.[5]

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[5]. While Holt contends Harvey's attempt at reading this clause as a forum selection clause is meritless, as discussed more fully infra at II B, Holt respectfully suggests this Court is not the proper forum for a routine fact finding inquiry regarding contract construction.

Before the trial court, Harvey filed a pre-answer motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). (Holt App. 1a). In his Brief in Support of Motion to Dismiss, Harvey referred to the choice-of-law provision by stating as follows:

> The Agreement between the parties provided that the laws of the State of Oklahoma would govern the transaction and plaintiff came to Oklahoma where it drilled the Campbell Well. Every significant, substantial and continuous activity which forms the basis for the Agreement took place in Oklahoma. For this Court to hold that in personam jurisdiction over this defendant exists in Texas, would be unfair and inequitable.

(Holt App. 22a-23a). The above quoted passage constitutes the extent of Harvey's reference to the provision he

now asserts is a forum clause. Harvey clearly did not raise or even hint to the trial court his belief the parties had contracted to select a forum. Because Harvey did not raise or preserve this issue for review, this issue cannot now be raised.

Considering Harvey did not raise this issue below, it hardly seems cricket for Harvey to accuse the lower courts of having "ignored" a forum clause. In any event, despite Harvey's insistence, the lower courts did not "ignore" this contract provision. Both the trial and appellate court duly accorded this choice-of-law clause its proper weight in the jurisdictional, minimum contacts analysis. See Memorandum Order (Harvey App. 4a); see also Holt Oil & Gas Corp. v. Harvey,

801 F.2d 773, 778 (5th Cir. 1986) (Harvey App. 17a); accord Burger King Corp. v. Rudzewicz, 471 U.S. 462, ____, 105 S.Ct. 2174, 2187 (1985) (discussing relevance of choice-of-law provision to minimum contacts analysis).

B. The Question Presented for Review Necessitates Fact Finding on Issues Neither Raised nor Decided Below

By contending their contract selected a forum for dispute resolution, Harvey raises for the first time, on Petition of Certiorari, a fact-bound routine question of contract construction and interpretation. If the clause at issue were to be recast as a forum selection clause, its enforceability would depend on numerous factual questions which were neither raised nor resolved below and are not

ripe for review by this Court.

Before a court will enforce a forum selection clause, it will scrutinize the clause to determine whether it meets the guidelines this Court established in Bremen. According to the Bremen decision, a forum selection clause should not be enforced if enforcement of the clause would be unreasonable and unjust, or the clause is invalid due to fraud or overreaching, or enforcement of the clause would be contrary to the public policy of the forum. Bremen, 407 U.S. at 15.

Because this clause has not been portrayed as a forum clause until now, no court has addressed the myriad of factual issues informing the Bremen

test. For example, whether a forum clause is unreasonable and unjust turns on whether suit in the contractual forum would be so gravely difficult and inconvenient that a party is effectually deprived of its day in court. Id. at 18. In determining whether fraud or overreaching invalidates a forum clause, a court must consider whether the agreement was in fact freely bargained for. In so doing, the court assesses the parties' relationship to determine if undue influence or overweening bargaining power infected formation of the contract. Id. at 12. Factors defining the parties' relationship include whether the parties are sophisticated business persons, whether the parties were represented by counsel, and

whether the agreement at issue is a printed form contract containing boilerplate language. Id. at 13 n.14. Whether a forum clause violates a strong public policy in the state where suit is brought necessitates determining the forum state's position as to such clauses.[6] Id. at 15.

Of course any allegation that contract language is ambiguous requires assessing the intent of the parties. Intent also is a factual question, and what Holt and Harvey intended their choice-of-law clause to mean -- other

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[6]. Neither court below has addressed Texas' clear disinclination toward forum selection clauses. See Fidelity Union Life Insurance Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972) ("We hold that the fixing of venue by contract . . . is invalid and cannot be the subject of private contract.").

than what it said -- was never addressed. Thus, the record is void of evidence as to whether the parties intended this choice-of-law clause to act as a choice-of-forum clause. Even if the Court were to assume, as Harvey insists, that Harvey meant his rejection of the letter agreement to convey a proposal for exclusive jurisdiction, (Petition at 4), there is neither reason to believe nor evidence to suggest Holt either knew or had reason to know of Harvey's meaning. See Zapata Marine Service v. O/Y Finnlines, Ltd., 571 F.2d 208, 209 (5th Cir. 1978); 3 A. Corbin, Contracts §537 (1960). There is no evidence Holt intended to waive its right to sue and be sued elsewhere merely by agreeing to

apply Oklahoma law to resolution of their disputes.

If this choice-of-law clause were to be read as a forum selection clause, these fact specific questions and issues would have to be resolved, and Holt respectfully suggests this Court is not the proper forum to address such questions when such questions were not raised below.

C. Objection to Venue is Waived Pursuant to Federal Rule of Civil Procedure 12(h)(1)

Essentially, the forum selection argument Harvey makes to this Court maintains Holt brought suit in the wrong place, that is, improper venue. To argue a forum selection clause deprives a court of jurisdiction simply misses the mark. When parties

contractually agree to a forum, they do not divest other forums of jurisdiction. Rather, in stipulating a forum, the parties ask other courts to decline jurisdiction and give effect to their agreement. Such a request is essentially a motion to transfer venue.

Harvey cannot cloak this venue objection with a jurisdictional mantle. Harvey waived this objection to venue by failing to raise it in his initial pre-answer motion to dismiss, filed April 6, 1983, in which he objected only to personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). (Holt App. 1a). Federal Rule of Civil Procedure 12(h)(1) provides objection to venue is

waived if omitted from a pre-answer motion made pursuant to Federal Rule of Civil Procedure 12(b).

III.

NO DUE PROCESS CONCERNS ARE RAISED BY THIS PETITION

A. Harvey Misperceives the Interaction Between Due Process and Forum Clauses

Harvey contends due process prohibits the exercise of in personam jurisdiction by the courts of a state when the parties to a contract have structured their agreement to select another state as the forum. As discussed above, the parties to this contract have not structured their agreement to select any particular forum state; they simply agreed to the selection of the governing law. In addition, failure to enforce a forum

selection clause does not invoke due process concerns. Rather, it is the converse situation, when forum clauses are enforced under unreasonable and unjust circumstances, that raises due process concerns. "Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' Bremen, 407 U.S. 1, 15 (1972), their enforcement does not offend due process." Burger King, 471 U.S. at ___, 105 S.Ct. at 2182 n.14.

Regardless of whether this clause is a forum clause as Harvey now contends, it is clear Harvey misperceives the effect of forum selection clauses in general. Harvey suggests a forum clause binds the

parties and courts and that such clauses are enforceable per se, at the risk of offending due process. The clear and well established law regarding forum selection clauses, however, is that such clauses do not oust the jurisdiction of all courts save those stipulated in the clause. Rather, in stipulating a forum, the parties ask other courts to decline jurisdiction and give effect to their agreement. It remains open to either party to present evidence as to circumstances negating enforcement of the clause. See LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4, 6 (1st Cir. 1984); see also Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir. 1966).

B. Harvey Misperceives the Interaction Between Due Process and Jurisdiction

In the context of personal jurisdiction, the due process clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." Burger King, 471 U.S. at _____, 105 S.Ct. at 2181-82 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). Under the classic precept enunciated in International Shoe, due process permits personal jurisdiction over a defendant in any state where the defendant has sufficient minimum contacts that the maintenance of the suit does not offend "traditional

notions of fair play and substantial justice." 326 U.S. at 316 (quoting Millikin v. Meyer, 311 U.S. 457, 463 (1940)); see also Asahi Metal Industry Co., Ltd. v. Superior Court of California, 107 S.Ct. 1026, 55 U.S.L.W. 4197, 4200 (1987); Calder v. Jones, 465 U.S. 783, 788 (1984). Thus, a plaintiff "may choose to bring suit in any forum with which the defendant has 'certain minimum contacts'" such that due process is not offended. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984) (emphasis supplied).

Clearly then, personal jurisdiction is not an exclusive concept existing in only one place at one time. Rather, the concept of jurisdiction and minimum contacts contemplates a defendant is

amenable to suit in more than one state simultaneously. A plaintiff need only show a defendant maintains the requisite minimum contacts with a state to establish it is both fair and reasonable to require the defendant to defend in the forum. Furthermore, a defendant's amenability to suit in a forum need not be deliberate or intentional.

> The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law -- i.e., certain factual showings will have legal consequences -- . . . . The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 704-05 (1982). Undoubtedly, Harvey may be sued in many places; as

the trial and appellate courts both found, Texas is just one such place.

Both the trial and appellate courts found Harvey had numerous purposeful contacts with the State of Texas[7] and that maintenance of suit in Texas did not offend traditional notions of fair play and substantial justice. Such findings fully comport with due process.

C. Harvey has Asserted no Prejudice of Constitutional Magnitude

Harvey has identified no specific difficulties or prejudice in being

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7. Indeed, Harvey admitted he was "doing business" in Texas in his Motion to Dismiss before the trial court. "Defendant does not challenge whether defendant was doing business in Texas within the literal definition of [the Texas long-arm statute]." (Holt App. 10a).

subject to suit in Texas -- not even the inconvenience and expense of traveling to Texas from Oklahoma.[8] No facts have been alleged, and indeed no such facts exist, to show the trial in Texas was so gravely difficult as to achieve constitutional magnitude by putting Harvey at a severe disadvantage. See Burger King, 471 U.S. at _____, 105 S.Ct. at 2190 (failure to demonstrate how jurisdiction in a particular forum is fundamentally unfair does not offend

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8. Harvey was not in fact inconvenienced. As the appellate court noted, "Harvey was in Texas during the week this case was tried to participate in a golf tournament." 801 F.2d at 780 (Harvey App. 21a).

due process); see also McGee v. International Life Insurance Co., 355 U.S. 220, 224 (1957).

IV.

THIS DECISION CREATES NO CONFLICT AMONG THE CIRCUITS AS TO THE ROLE A CHOICE-OF-LAW CLAUSE PLAYS IN DETERMINING IN PERSONAM JURISDICTION

The Fifth Circuit's decision in this case creates no conflict among the circuits. Contrary to Harvey's assertion, Burger King, Sea Lift, Inc. v. Refinadora Costarricense De Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986), and Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), cert. denied, 466 U.S. 962 (1984), do not give controling weight to choice-of-law clauses on the question of in personam jurisdiction in contract cases.

Indeed, in Burger King, this Court specifically stated a choice-of-law "provision standing alone would be insufficient to confer jurisdiction." 471 U.S. at _____, 105 S.Ct. at 2187.[9]

A review of Sea Lift also indicates Harvey's argument is misconceived. The contract at issue in Sea Lift contained a clause selecting English law as the governing law. In finding Florida lacked jurisdiction over the defendant,

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9. In his Petition, Harvey also admits "choice-of-law clauses merely provide that the law of another state will 'govern', which allows any forum to apply the law chosen." (Petition at 15). Not only is the Holt-Harvey clause entitled "Governing Law", but the clause itself states the agreement "shall be governed" by Oklahoma law. Thus, Harvey admits this clause is nothing more than a choice-of-law clause and cannot, despite his tortuous reading, be enforced as a forum selection clause.

however, the Eleventh Circuit in no way stated or implied that as a result of the choice-of-law clause England was the only forum in which suit could be brought.[10] The court merely stated the parties' choice of English law was one factor, among many, showing the defendant had not purposefully availed itself of the benefits and protections of Florida law. The Eleventh Circuit's use of a choice-of-law clause in Sea Lift fully comports with the appellate

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10. In addition, Sea Lift is a "specific" jurisdiction case, and thus, analysis focused on the relationship among the defendant, the forum and the litigation. Harvey was found to be subject to "general" jurisdiction because his contacts with Texas were continuous and systematic. See Helicopteros Nacionales de Columbia, S.A. v. Hale, 466 U.S. 408, ____, 104 S.Ct. 1868, 1872 nn.8 & 9 (1984).

court's decision below in which the Fifth Circuit found that despite the parties' choice of Oklahoma law, Harvey had sufficient purposeful contacts to subject him to jurisdiction in Texas. 801 F.2d at 778 (court cites Burger King as authority for relevance of choice-of-law to minimum contacts analysis).

Similarly, in Hydrokinetics, the Fifth Circuit noted the choice of Alaska law to govern the parties' relationship was a factor in considering whether defendant had made a calculated effort to engage in or solicit business in Texas.[11]

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[11]. Again, jurisdiction in Hydrokinetics was denied on the basis of specific, rather than general, jurisdiction.

Hydrokinetics' references to the parties' choice-of-law provision in the contract are juxtaposed against the fact the contract was entered into in Texas. Thus, the court emphasizes the choice-of-law provision merely to counter the long-arm concept 'that attaches jurisdiction to the place where the contract is entered into and, consequently, submits the parties to jurisdiction there. Thus, the court states:

> [A]lthough the bargain may have been cemented in Texas when Hydrokinetics accepted Alaska Mechanical's offer, the significance of that is diminshed by the provision specifying that the agreement be governed and construed according to the laws of the state of Alaska.

700 F.2d at 1029 (similar statements occur at 700 F.2d 1030 & 1031).

Although Harvey insists Hydrokinetics conflicts with the appellate court's decision in this case, Harvey neglects to point out the appellate court quoted the above statement from Hydrokinetics almost verbatim in discussing the parties' choice-of-law provision:

> Although the contractual relationship between Holt and Harvey may have been cemented in Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement.

801 F.2d at 778. (Harvey App. 16a-17a).

Clearly, the decision below accords with Hydrokinetics, Sea Lift and Burger King, and Harvey's claim that this decision conflicts with other circuits and within the Fifth Circuit is totally without merit.

CONCLUSION

On Petition for Writ of Certiorari, Petitioner Ralph L. Harvey presents a single question for review by this Court. For the reasons stated above, Respondents Holt Oil & Gas Corporation and Faywin Investment Pty. Ltd. respectfully request this Court deny the Petition, as nothing raised therein constitutes a proper question for review.

Respectfully submitted,

C. Steven Matlock, Jr.
JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER
6000 InterFirst Plaza
901 Main Street
Dallas, Texas 75202
214/953-6053

/s/C. Steven Matlock, Jr.
C. Steven Matlock, Jr.
Counsel for Respondents

Of Counsel:
Patricia J. Kendall

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, by Certified Mail Return Receipt Requested, to Mr. William Pannill, 1600 Two Houston Center, 909 Fanin, Houston, Texas 77010-1007, counsel for Petitioner, on this 20th day of March, 1987. I further certify that all parties required to be served have been served.

/s/ C. Steven Matlock, Jr.
C. Steven Matlock, Jr.

1646P

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HOLT OIL & GAS CORPORATION,	)	
Plaintiff,	)	
v.	)	No. CA3-83-0277G
RALPH L. HARVEY,	)	
Defendant.	)	

MOTION TO DISMISS

Defendant, Ralph L. Harvey, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, moves this Court to dismiss the Complaint for the reason that this Court cannot exercise jurisdiction over the person of the defendant. The requisite contacts of defendant with the State of Texas necessary to meet the requirement

of due process under the United States Constitution are insufficient to sustain this Court's exercise of in personam jurisdiction over a non-resident defendant. The exercise of jurisdiction over the person of defendant by a court sitting in Texas would offend traditional notions of fair play and substantial justice. A Brief in Support of the Motion to Dismiss is filed simultaneously herewith.

WHEREFORE, defendant, Ralph L. Harvey, requests that the Court dismiss the Complaint for lack of jurisdiction over the person of defendant.

/s/Doneen Douglas Jones
Harry H. Selph, II
Doneen Douglas Jones
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2400 First National Center
Oklahoma City, Oklahoma 73102
405/232-0621

and

Roger E. Beecham
BEECHAM, BROWN & LONGENECKER
1010 Dallas Federal Savings Tower
8333 Douglas
Dallas, Texas 75225
214/750-0050
Bar Card No. 02036500

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1983, a true and correct copy of the above and foregoing Motion to Dismiss and Motion to Strike was mailed, postage prepaid, to C. Steven Matlock, Esq., Jackson, Walker, Winstead, Cantwell & Miller, 4300 InterFirst One, Dallas, Texas 75202, attorney for plaintiff.

/s/ Doneen Douglas Jones
Doneen Douglas Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HOLT OIL & GAS CORPORATION,	)	
Plaintiff,	)	
v.	)	No. CA3-83-0277G
RALPH L. HARVEY,	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

This Brief is filed on behalf of defendant, Ralph L. Harvey, in support of his Motion to Dismiss. Plaintiff obtained service of process on defendant under the Long Arm Statute of Texas, Rev. Civ. Stat. Ann. Art. 2031b. Defendant does not have sufficient contacts with the State of Texas to sustain an exercise by this

Court of in personam jurisdiction consistent with the due process requirements of the United States Constitution.

This action arises from an alleged breach by defendant of an operating agreement. On November 25, 1983, plaintiff and defendant entered into an Operating Agreement (hereinafter the "Agreement") a copy of which is attached to the Complaint. The Agreement was modified by the certain letter, dated November 24, 1981, which is attached hereto as Exhibit "A" and made a part hereof by this reference. Under the Agreement, plaintiff, as operator, agreed to explore and develop an oil and gas leasehold in Oklahoma known as the Campbell Prospect located

in the Southwest Quarter (SW/4) of Section Eleven (11), Township Two North (T2N), Range Twenty-Three East Cimarron Meridian (R23ECM), Beaver County, State of Oklahoma (the "Subject Property"). Plaintiff has drilled a well (the "Campbell Well") on the Subject Property. Plaintiff contends that defendant breached the Agreement by failure to pay all of his pro rata share of the operating expenses of the Campbell Well. Plaintiff further alleges that defendant committed a tort by representing to plaintiff that he would pay all sums under the Agreement, that plaintiff relied upon this representation and, therefore, has suffered damages.

STATEMENT OF FACTS

Plaintiff is a Texas corporation with its principal place of business in Dallas, Texas. Defendant is an individual who resides in the State of Oklahoma. Defendant owns certain oil and gas leasehold rights covering a portion of the Subject Property. Defendant's initial contacts with plaintiff were in regard to a proposed farmout of defendant's acreage to plaintiff or participation by defendant in the Campbell Well and were originated by plaintiff via telephone conversation and written correspondence. Defendant chose to participate in the Campbell Well and subsequent thereto plaintiff and defendant communicated by telegram and

by correspondence on the progress of drilling and of attempted completion of the Campbell Well, expenses incurred therein, approval to plug and abandon the well and solicitation in regard to defendant's approval of well recompletion expenses. All correspondence and telegrams between the parties deal with the Campbell Well located in the State of Oklahoma. On three occasions, defendant sent checks (totalling $66,478.47) to plaintiff at its office in Dallas, Texas, in payment of defendant's pro rata share of the expenses of drilling and attempted completion of the Campbell Well.

Other than the aforementioned contacts, defendant has not transacted or engaged in any business activity,

whether related or unrelated to this suit, within the State of Texas. Likewise, defendant does not own property within the State of Texas, has no bank accounts within the State of Texas, has not appointed any agent for service of process and maintains no office or residence within the State of Texas. No contact with the State of Texas exists except the communications, most of which were initiated by plaintiff, in regard to the Campbell Well and payment by defendant on three occasions to plaintiff's offices located in Texas. Attached hereto, marked Exhibit "B" and made a part hereof by this reference is the Affidavit of Ralph L. Harvey, which sets forth his statement as to the

absence of contacts with the State of Texas.

THE CONTACTS OF DEFENDANT WITH TEXAS DO NOT CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO MAKE DEFENDANT AMENABLE TO THE JURISDICTION OF A TEXAS COURT

Defendant does not challenge whether defendant was doing business in Texas within the literal definition of Tex. Rev. Civ. Stat. Ann. Art. 2031b(4). He does challenge whether the federal constitutional requirements of due process permit this Court to exercise jurisdiction over the person of a non-resident defendant. Any inquiry into whether the exercise of personal jurisdiction is permissible in a particular case depends upon the facts of each case. 2 J. Moore, Moore's Federal Practice (2d ed. 1974),

Paragraph 4.25[5]. The contacts of defendant with Texas are insufficient to sustain a finding that defendant is amenable to the jurisdiction of the Texas courts.

The United States Supreme Court has long emphasized that the Constitution requires certain minimum contacts between a defendant and the forum state before the courts of the forum state properly may exert in personam jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct. 154 (1945); Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 1283, 78 S.Ct. 1228 (1958). These limitations are more than mere guarantees of immunity from defending in an inconvenient or distant forum. Due

process requires that such limitations be observed.

Due process inquiry into personal jurisdiction centers around the relationship of the defendant, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S. Ct. 2579 (1977). Jurisdiction must be reasonable in light of the contacts of defendant with the forum state. Such reasonableness depends upon the nature and the quality of the defendant's activity. International Shoe Co. v. Washington, supra.

A dual test exists for determining whether a court may exercise its jurisdiction without depriving a non-resident defendant of due process of law. First, due process requires

minimum contacts of the defendant with the state which result from an affirmative act of the defendant. Second, it must be fair and reasonable to require the defendant to come into the state and defend the action. Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5 Cir. 1974).

In essence, the contact of a non-resident defendant with the forum must not be fortuitous. The threshold inquiry is whether the defendant purposefully availed himself of the benefits and protection of the forum's laws so that maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct.

154 (1945); Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S. Ct. 1228 (1958). The Texas business activity by the non-resident defendant must be sufficient to indicate a purposeful enjoyment of the benefits and protections of Texas law. Benjamin v. Western Boat Building Corporation, 472 F.2d 723 (5th Cir. 1973). The contacts of defendant herein fall short of the requirements of due process. The facts conclusively show that defendant did not purposefully avail himself of the benefits and protections of the forum's law.

The Agreement concerned the exploration and the drilling of a well on a tract of land located within the State of Oklahoma. Article XIV(B) of

the Agreement states:

> "B. Governing Law: The essential validity of this agreement and all matters pertaining thereto, including, but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located. If the Contract Area is in two or more states, the law of the state where most of the land in the Contract Area is located shall govern."

There is no dispute that the "contract area" (Subject Property) is located in Oklahoma. Clearly, defendant was expecting the benefits and the protections of the laws of the State of Oklahoma. Defendant could not reasonably foresee the need to invoke the benefits and protections of Texas law.

Further, the minimal contact of defendant with the State of Texas in transmitting checks for payment of his pro rata expenses is not an activity sufficient to indicate an affirmative act by defendant to invoke the benefits and protections of the laws of Texas. In U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), U-Anchor, a Texas corporation, solicited and entered into a contract with Burt, an Oklahoma resident, for the placement of five advertising displays for Burt at various Oklahoma highway locations. Burt's only contact with Texas consisted of the remittance of five or six payments to U-Anchor at its office in Amarillo, Texas. The Court held that Burt's mailing of payments to

U-Anchor at its office in Texas would not support an inference that Burt intended to invoke the benefits and protections of Texas law. The minimal and fortuitous contact of Burt with Texas could not sustain exercise of jurisdiction by a court sitting in Texas. If the contacts in U-Anchor were considered minimal and fortuitous, a fortiori, defendant's payment to plaintiff in Texas does not rise to the level of contacts necessary for a Texas court to exercise in personam jurisdiction over this defendant.

Additionally, the Fifth Circuit has recognized that communications between a plaintiff and a defendant are insufficient contacts to merit an exercise of in personam jurisdiction.

In Benjamin v. Western Boat Building Corporation, 472 F.2d 723 (5th Cir. 1973), the Court held that 50 letters between Benjamin and Western Boat could not form a basis for an exercise of in personam jurisdiction over Western Boat. Benjamin, a Louisiana resident, contracted with Western Boat, a Washington corporation, to design and construct a vessel. After submitting a bid for the construction of the vessel, Western Boat received a letter and contract from Benjamin. The contract was executed and Western Boat constructed the vessel in the State of Washington. Benjamin and Western Boat communicated both by telephone and through written correspondence about particulars of the construction. The

majority of the communications were initiated by Benjamin. The Fifth Circuit, in reversing the decision of the lower court, held that this substantially unilateral activity by Benjamin could not satisfy the minimum contacts required by due process.

The facts of the case at bar are very similar to those of the Benjamin case. Here, as there, the plaintiff originated the majority of the correspondence which concerned the particulars of the performance of the Agreement between the parties. In the case at bar, the defendant responded only as was necessary. These contacts simply do not indicate a purposeful availment by this defendant of the benefits and protections of the laws of

the State of Texas. Even considering both the communications and the remittance of payments by defendant to plaintiff in Texas, defendant has not performed an affirmative act indicating substantial, continuous and regular activity within the State of Texas. The limitations of due process have not and cannot be satisfied under the facts of the case at bar.

Another basis for exerting in personam jurisdiction is that the defendant's contacts with the forum be deliberate such that an expectation of profit be derived therefrom. Product Promotions, Inc. v. Cousteau, supra. Defendant's contacts with Texas are not founded upon an expectation that defendant would profit from business

transacted in Texas. Any expectation of profit came from development of defendant's leasehold interest in property located in Oklahoma. Merely because development was undertaken by a Texas corporation does not indicate that defendant purposely availed himself of the benefits and protections of Texas law. In fact, just the opposite is true under the Agreement. Defendant expected profit, if any, to flow from his contacts with Oklahoma, specifically development of the leasehold interest in Oklahoma.

The contacts of defendant with Texas are minimal and fortuitous. To require defendant under the facts of this case to submit to the jurisdiction of a court sitting in Texas would

offend traditional notions of fair play and substantial justice. Consideration such as the quality, nature and extent of the activities in the forum state; the relative convenience of the parties; the benefits and protections of the law of the forum and the basic equities of the situation determine whether traditional notions of fair play and substantial justice have been offended. U-Anchor Advertising, Inc. v. Burt, supra. These considerations clearly show that this Court should not exercise jurisdiction over the person of defendant.

This action arises from the drilling and attempted completion of an oil and gas well by plaintiff in the State of Oklahoma. The Agreement

between the parties provided that the laws of the State of Oklahoma would govern the transaction and plaintiff came to Oklahoma where it drilled the Campbell Well. Every significant, substantial and continuous activity which forms the basis for the Agreement took place in Oklahoma. For this Court to hold that in personam jurisdiction over this defendant exists in Texas, would be unfair and inequitable.

Defendant's minimal fortuitous contacts do not make him amenable to the jurisdiction of this Texas Court. The due process requirements necessary of in personam jurisdiction cannot be satisfied under the facts of the case at bar. The Complaint should be dismissed for lack of in personam

jurisdiction over defendant.

/s/Harry H. Selph, II
Harry H. Selph, II
Doneen Douglas Jones
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2400 First National Center
Oklahoma City, Oklahoma 73102
405/232-0621

and

Roger E. Beecham
BEECHAM, BROWN & LONGENECKER
1010 Dallas Federal Savings Tower
8333 Douglas
Dallas, Texas 75225
214/750-0050
Bar Card No. 02036500

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1983, a true and correct copy of the above and foregoing Brief in Support of Motion to Dismiss and Motion to Strike was mailed, postage prepaid, to C. Steven Matlock, Esq., Jackson, Walker, Winstead, Cantwell & Miller, 4300 InterFirst One, Dallas, Texas 75202, attorney for plaintiff.

/s/Doneen Douglas Jones
Doneen Douglas Jones

BEST AVA

25a

RALPH L. HARVEY, PRESIDENT
LARRY J. GORDON, VICE PRESIDENT
MIDLAND DEPT.

Marlin OIL CORPORATION

2700 FIRST NATIONAL CENTER OKLAHOMA CITY, OKLAHOMA 73102 405-232-3267

November 24, 1981

NOV 2 6 198

Holt Oil & Gas Corporation
Campbell Center II, Suite 1255
8150 North Central Expressway
Dallas, TX 75206

Attention: Mr. Tyrrell Hearn

RE: SW/4 Section 11-2N-23ECM
Beaver County, Oklahoma

Gentlemen:

Receipt is acknowledged of your letter dated November 18, 1981, in which you enclosed your invoice No. 246, two copies of a Letter Agreement, and an Operating Agreement pertaining to the captioned unit. I am hereby rejecting the letter agreement and invoice submitted, as I am willing to participate and pay my pro-rata share of the drilling expenses, including the drilling title opinion, so long as the invoices are accompanied with a copy of the back-up invoices. I am unwilling to pay for the drilling and completion charges in advance, and any part of Holt's acquisition, evaluation, legal and acreage costs. I am willing to sign the Operating Agreement submitted subject to the following changes:

1) Article IV B. Loss of Title:

   a) Subsections 1 and 2: The original text of the Operating Agreement shall be reinstated.

   b) Subsection 3: Shall be amended to read as follows: "3. Other Losses: All losses incurred, other than those set forth in Article IV B.1 and IV B.2 above, shall not be considered failure of title, but shall be individual losses and shall be borne by the parties in the same manner as outlined in Article IV, Section B, Subsection 1.

2) Article V C. Employees: The original text of the Operating Agreement shall be reinstated.

3) Article VI A. Initial Well: As the well has already been spudded, change this from a location selected by the Operator to the C SE/4 SW/4 of Section 11-2N-23ECM, Beaver County, Oklahoma.

EXHIBIT A

Exhibit A

ILABLE COPY

4) Article VI B. Subsequent Operations: Shall be deleted in its entirety and the attached Article VI B shall be used.

5) Article VI E. Abandonment of Wells: To remain consistent with the deletion on Page 8, Line 1, the sentence beginning in the middle of Page 7, Line 67 shall be deleted in its entirety.

6) Article VII D. Limitations of Expenditures: Subsection 3, Page 9, Lines 30 and 38. The twenty thousand dollars shall be changed to ten thousand dollars.

7) Article VII F. Rentals, Shut-in Well Payments and Minimum Royalties: Page 9, Lines 57, 58, 59 and 60: The original text of the Operating Agreement shall be reinstated.

8) Article XIII Term of Agreement: Option 1 shall not be used, but Option 2 shall be used subject to the following changes:

   a) Page 14, Line 4: The time frame of 120 days shall be used.

   b) Page 14, Line 11: The time frame of 120 days shall be used.

9) Article XV Other Provisions: All other provisions shall be deleted.

10) Exhibit "A" shall be amended as follows:

    IV. Add Mr. Harvey's telephone number: 405-232-3267

11) Exhibit "C" II Direct Charges: Subsection 1. The phrase "plus consultants' fees for maintaining delay rentals and lease records", shall be deleted.

I am willing to participate in the drilling of the #1 Campbell in the SE/4 SW/4 of the captioned section, and I have enclosed your A.F.E. subject to the above changes to Holt's proposed Operating Agreement. This offer to participate will terminate on the date the No. 1 Campbell reaches total depth if I have not received confirmation of Holt's acceptance of these changes. If these changes are acceptable, please sign and return one copy of this letter to my office.

Respectfully,

Ralph L. Harvey

Ralph L. Harvey

RLH/ph

The above changes are agreed to and accepted this 25th day of November, 1981.

HOLT OIL AND GAS CORPORATION

By: Clyde Cooder

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Ralph L. Harvey, being duly sworn upon oath, deposes and says:

1. I am the defendant in an action styled Holt Oil and Gas Corporation v. Ralph L. Harvey, brought in the United States District Court for the Northern District of Texas, Dallas Division, civil action No. CA3-83-0277G. I am making this affidavit in support of the Motion to Dismiss the Complaint for lack of in personam jurisdiction.

2. I do not own any real property or personal property in Texas.

3. I do not maintain any office or residence in Texas.

4. I do not now have any agent in Texas.

5. I do not now have any bank account in Texas.

6. I do not conduct any business in my individual capacity in Texas.

7. I have no registered office within Texas and have never authorized an agent to accept service of process within Texas.

EXHIBIT B.

/s/Ralph L. Harvey
Ralph L. Harvey

Subscribed and sworn to before me this 4th day of April, 1983.

/s/Joyce Jennings
Notary Public

My commission expires: 12-14-83